IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

IN RE: ACTOS (PIOGLITAZONE) PRODUCTS LIABILITY LITIGATION	MDL NO. 6:11-md-2299
THIS DOCUMENT APPLIES TO: Terrence and Susan Allen v. Takeda Pharmaceuticals International, Inc., et al., NO. 6:12-cv-00064-RFD-PJH	JUDGE DOHERTY MAGISTRATE JUDGE HANNA

ORAL ARGUMENT ON MOTIONS IN LIMINE

Transcript of Proceedings before The Honorable Rebecca F. Doherty, United States District Judge, Lafayette, Lafayette Parish, Louisiana, commencing on October, 15, 2013.

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(Lafayette, Lafayette Parish, Louisiana; October 15, 2013, in open court.)

THE CSO: All rise. United States District Court for the Western District of Louisiana is now in session, Honorable Rebecca Doherty presiding. God save the United States and this Honorable Court.

THE COURT: You already have your hands on your hips, Mr. McElligott? I haven't said anything this morning.

MR. McELLIGOT: Sorry.

THE COURT: Not sorry. It just shows the stance, you know. I taught school way too long not to pick up on hostility.

All right. Please be seated. All right, good morning.

ATTORNEYS: Good morning, Judge.

THE COURT: Now, for those of you who have been with me before, you know I am very punctual; I am rarely late. So don't think you can just come lollygagging in. I have been dealing with other things.

Carmen, Gary, Kenny, Judge Davis says we can use Duhe's space. Cathy will block off the third floor area. I suggest we flip a coin. Okay? What that is about -- and that's one of the reasons I'm late. The Special Masters came -- I'm going to stand for awhile -- came and we were going through some of the trial logistics. One of the things that they suggested was that each

side will need a staging area, so I was trying to get that arranged because it will be a very busy time here.

Because of my being in trial, the magistrate judges are going to be trying a lot of consent trials, and so they have to have cases -- I mean, courtrooms to do it. And Judge Foote, who is handling my criminal docket -- the new criminal docket; I have my old criminal docket -- is going to be trying cases during that time. So you see what all -- it takes like three people to do what I ordinarily do. So you understand now why I, you know, these things have to be done on time if I'm going to keep all the trains running on time.

So Judge Duhe was, for those of you who are not local, one of our two Fifth Circuit judges. We have Fifth Circuit judges chambers on the fifth floor. Judge Davis still is active and he has his area up there. Judge Duhe took senior inactive status. It's complicated, but basically it means he doesn't have to come in, but they can call him back if they need him. So his chambers area is still up there.

So when I was trying to find space, Cathy Bacon suggested we see if I could beg a favor from Judge Davis, and he very graciously agreed. There's a separate door that goes into it. Just whichever side ends up using that, you know, don't bring a lot of chaos up to the fifth floor, okay. You know, they don't do trial work. Don't bring a lot of chaos. Because he said, Which side? I said, I don't know, Judge.

My suggestion will be we'll flip a coin because it's going to be much nicer than the third floor, and it's larger. So if y'all can agree which side might need it, great. If not, I suggest you flip a coin, and whomever gets it, gets it.

Now, it will put neither side at an advantage or a disadvantage because one group will be coming up from the third floor, one group will be coming down from the fifth floor, and we're on the fourth. But it gives everybody a place where you can leave all your stuff, and you don't have to worry about it. Technically, we cannot guarantee that anything that you leave in a room in the building during the time that the building is closed will be safe. Consequently, you need to take everything with you when you leave. So, the doors are locked at night. It's your choice. Okay?

All right. So that takes care of that. So we just need to -- Carmen, Gary, and Kenny -- figure out which one is going to do it and then get them arranged.

Richard?

MR. ARSENAULT: They can have the fifth floor, Your Honor.

MS. GOURLEY: That's very generous and kind. I was going to suggest that perhaps the party whose case in chief it is might need more space and we can switch off or --

THE COURT: My God, you're acting like McConnell and Reid. Well, y'all decide; I don't care. And I appreciate each

of you being gracious about it. So just figure it out. It doesn't matter. And in fact, if we have time, I don't know whether my clicker works up there or not.

And Shree and Chris, we're going to have to work with Cathy to make certain they have a way to get in that door up on the fifth floor, the one that goes to Duhe's chambers. We can go up when we finish here, go up and look at it. And then you know what the third floor looks like. And it might be -- of course, again, I'm just, you know, considering things here. It might be better for the plaintiffs to be in the third floor conference room. And I say that because you have all the electronic stuff there, and you can get your PSC members and that sort of thing on that, which is perhaps of more value to the plaintiffs -- thank you, Carol.

(Brief pause.)

THE COURT: Okay. Cathy Bacon said the only concern about using Judge Duhe's chambers is that, if you really wish to try to do this, you can go through the library and get into Judge Davis' chambers. If any of you does that, you will be shot on sight, and you'll lose the privilege of using Judge Davis' chambers -- I mean, Judge Duhe's chambers, so I don't think with this group it's going to be a real issue.

Okay, where was I? Oh, yes. It might be of benefit for the plaintiffs to be on the third floor, because if you coordinate with Brent ahead of time, you know, you can have the

video conferencing capability, and that may be -- cause y'all, you know, I don't think the defense is going to have that same concern, but the plaintiffs might. So it may be that that would be advantageous for you.

All right. Now would each party please identify for the record?

MR. PENNOCK: Paul Pennock from Weitz & Luxenberg for the plaintiffs, Your Honor.

THE COURT: Okay. Just one moment.

(Off the record.)

THE COURT: Once you decide, you know, who is going to go where, let me know, and as Shree said, we might need to schedule a "tar" with Linda who is Judge Davis' secretary. He says that's tour, but looks like tar to me.

All right. Would everyone please identify for the record because there are faces I have never seen before. Start with the plaintiffs.

MR. PENNOCK: Paul Pennock for the plaintiffs, Your Honor. Good morning.

THE COURT: Good morning.

MR. LANIER: Good morning, Your Honor. Mark Lanier, plaintiffs.

THE COURT: Good morning, Mr. Lanier.

MR. ARSENAULT: Good morning, Judge. Richard Arsenault, plaintiffs.

THE COURT: Good morning, Mr. Arsenault.

MR. SEDGH: Good morning, Your Honor. Jonathan Sedgh from Weitz & Luxenberg for the plaintiffs.

MR. BROWN: Good morning, Your Honor. Alex Brown for plaintiffs.

THE COURT: Okay. Remind me again the two of you, why you're here.

MR. BROWN: I'm with Mr. Lanier's firm.

THE COURT: Okay. So you're with Lanier.

MR. SEDGH: I'm with Mr. Pennock.

THE COURT: Oh, you're with Pennock. Okay. All right, okay. All right. Good morning, Ms. Gourley.

MS. GOURLEY: Good morning, Your Honor. Sara Gourley on behalf of the defendants.

THE COURT: Good morning.

MR. PARKER: Good morning, Your Honor. Bruce Parker for the defendants.

THE COURT: Oh, my goodness gracious, you do exist.

MR. PARKER: Yes, Your Honor, I do.

THE COURT: All right. Nice to finally meet you, Mr. Parker.

MR. PARKER: Wonderful to be here, Your Honor.

THE COURT: Okay. And you're from where?

MR. PARKER: Baltimore.

THE COURT: Maryland, okay. For some reason I had you

from one of the Carolinas. So you're from Maryland.

MR. PARKER: I'm from Maryland. Well, that's where I am now.

THE COURT: That's where you are now, uh-huh. Okay, all right. Parker, right, Bruce?

MR. PARKER: Yes, ma'am. Yes, Your Honor.

THE COURT: If I call you John, forgive me. We had a judge over in the middle district who is John Parker.

MR. PARKER: I've been called a lot of things, Your Honor. That's probably one of the more polite ones, John.

THE COURT: Okay, all right. Bruce Parker, Maryland, okay. All right.

MR. McELLIGOT: Jack McElligott for the defendants.

THE COURT: Yes, I know you, Mr. McElligott. All right.

MS. PRUITT: Your Honor, my name is Lyn Pruitt. I'm an attorney from Little Rock, Arkansas, and I'm here for the defendants observing. I may be involved in some of the future trials. They may ask me to do that, so I wanted to get familiar with the Court.

THE COURT: Okay. Is your microphone on? Pull it over in front of you, and the light should be glowing green.

MS. PRUITT: It's glowing.

THE COURT: Now it's glowing.

MS. PRUITT: I've never been accused of being quiet, so

I can speak up.

THE COURT: Yeah, yeah. Well, you have that nice southern, soft manner about you. Okay. So, as I understand it, Ms. Pruitt -- well, first, I don't know you, do I?

MS. PRUITT: I don't think so, Judge. I've never -- I've never tried a case in your court.

THE COURT: No, that wasn't my question. My family is from Arkansas, and do you know Sam Perroni?

MS. PRUITT: Yes, very well.

THE COURT: Uh-huh. I've met you, and the name, when the name was brought up, it was extremely familiar. What about Nicole Graham? She's now Nicole Vaccarella. She went to the same law school that you did.

MS. PRUITT: I don't know Nicole.

THE COURT: No, so it's probably through Sam.

MS. PRUITT: Probably through Sam because he and I are good friends.

THE COURT: That's probably where I've heard the name and probably where I've met you.

MS. PRUITT: And I was going to ask where your relatives were from because mine are from south Arkansas.

THE COURT: Well, it's a long and not a pretty story. My father's family was from Wells Bayou. If you know where that is, you win the turkey. My mother's family is -- they are the Knights. They were from Gould. If you know where that is, I

give you my deepest sympathies and condolences.

MS. PRUITT: I definitely know where Gould is.

THE COURT: Yes. And my mother and sister live in Hot Springs and have for some time and have a place in the Quapaw in Little Rock, and so, you know, stomping grounds. Arkansas didn't like me and I didn't like Arkansas.

MS. PRUITT: I'm sorry.

THE COURT: Yeah. I only lived there for about two-and-a-half years when my parents first separated and divorced. And as I say, I didn't like Arkansas and Arkansas didn't like me. We've come to a truce, and I do enjoy going up. But it's probably through Sam. But I've met you before. I remember the face, and the name was exceedingly familiar, so it was probably through Sam.

MS. PRUITT: Yeah. Don't ask Sam any questions. He has several stories he might tell you. I'm not sure if they will be good or bad.

THE COURT: Well, I'll probably be seeing Sam before too long. I'll be going up, I think, around Thanksgiving. I try to see Sam when I can when I go up.

For those of you who are on the other side, Sam Perroni is a family friend. He is a lawyer in Little Rock, Arkansas. He was an AUSA, and then he went out and started doing defense work. In my opinion he's probably one of the best trial lawyers I've ever seen operate.

He is pretty much quasi retired now. He had some medical issues. Sam is about 12 feet tall, literally, and he's been rear-ended a couple of times, none of them his fault, which have given him some real problems with his back. I think he really is like 7-2 or something. Yeah, he's quite tall. And he also has had some other issues, but he still dabbles.

And he used to call my mother who knew everybody from southeast Arkansas -- Lord, God, Anna Belle did and does -- when he had a jury from southeast Arkansas to find out who these people were. So he's an old family friend from way, way back. So that's the connection.

And I knew when I heard the name, I mentioned it to the Special Masters. I just wanted to make certain there wasn't a stronger connection here, but we just have a mutual friend, and that's probably why I've heard the name, and that's probably why the face is familiar. I've probably seen her at a cocktail party or something like that.

All right, okay. Now, Ms. Pruitt, as I understand it, you are likely to try the second bellwether. If, in fact, that is the case, it is this Court's long-standing, some 21-year in tradition, custom, and requirement that trial counsel must participate in a meaningful fashion in all matters that are interactive with the Court that lead up to a trial. Anyone else can participate if they want, but trial counsel, and that means all trial counsel, unless they are excused, must participate. If

for no other reason -- and I'm not just being persnickety, but it creates an institutional memory.

Now that you see how I handle motions in limine, any conference you have with me, other than, you know, the ones that are for different purposes, okay, once we get to trial conferences, they are working conferences, and I want the institutional memory there. I want the understanding of what the rationale was behind any ruling that I make before trial because I don't want to have to explain it or defend it in front of a jury when we come to trial.

If it's a jury trial, I do not get involved beyond, you know, yes, we have no bananas, or speak a little more slowly. That's what this means. You will see this. It means speak a little more slowly. Ms. Gourley is smiling. Those who have been here have seen it. Mr. Lanier knows it well. So does Mr. Arsenault.

So there are certain things that just make it go more smoothly once we have the jury here, and you know, this has been something that -- I was a litigator, so having litigated, I thought this was very important, and I have found over the 21 years it is exceedingly important, and I do not compromise on that point.

MS. PRUITT: I understand, Your Honor.

THE COURT: Okay. Same thing, Mr. Parker. Because there was perhaps some confusion about this early on, I have

compromised a tad on this, but that tad has already been used up, okay? So, all righty. Okay.

All right. Now I spoke with the Special Masters -- again, that was one of the reasons we were -- I was running a little bit behind -- about some of the things that you had ideas about and concerns about. Mr. Parker and Ms. Pruitt, yes, since you are kind of new to the party -- yeah, and you're just going to have to listen to it for a while. It's the way it is. You're just going to have to listen to it for a while.

Since you are somewhat new to the party, I think they will tell you, I'm pretty much open to suggestion, I really am. I told the group at the very beginning, you know, one of the knocks, if you will, against MDLs in coming to the federal court is people believe they lose control of their cases. And I said, Okay, if that's what you want, I'll give you control of it, but be careful what you wish for because that means you're going to have to be responsible. You're going to have to move it forward, and you're going to have to act like professionals, and you know, they have risen to the occasion beautifully.

Now, that having been said, so now that we're coming down to the ones that will be standing up and doing most of the chatting with the jury, I'm open to suggestions, you know. You got to, you know, you want to -- they talked about starting early. We will not be starting at 8:30. Will not happen. 9:00 perhaps, but I've talked with them about that. I think your

idea of finishing early in the day and letting the jurors go home is a great idea, because otherwise we're going to lose a large portion of our potential jurors because south Louisiana, we have a lot of people that are welders and self-employed kind of people and, you know, their business will shut down. If they don't work, they don't eat.

Also, we've got a lot of people that, you know, work in the oil patch, and that sort of thing. And the oil patch is not necessarily known for its indulgence of people who don't show up. So notwithstanding it's against the law kind of thing to kick them out, but -- so I think that's an excellent idea. I have talked with the Special Masters about it. Chat with them. So I think that's a great idea.

I also raised some concerns that I had about some of the issues that are likely to come up with the potential jury venire. So they will be talking with you about that. I'm pretty open, but I just want you to have time to think about it. Again, Mr. Parker and Ms. Pruitt and to some extent Mr. Lanier -- I think he knows this -- pretty much with me, what you see is what you get, and I'm really nice unless backed into a corner. Folklore is I'm not nice when backed into a corner. I think folklore is incorrect on that point, but there might be those who would beg to differ.

So, you know, if you have something you want to, you know, lay out there, let me know. I'm easy to do it. Like, you

know, the Special Masters said this morning, you need a staging area. Okay. I spent some time and got you a staging area, so --

So, at any rate, work with them on that. Having been a litigator, I would much prefer that we have all of this extraneous stuff figured out before we get into this business of trying it because then you don't have to worry about that. You can put your focus on -- somebody has got a Blackberry or something that's receiving, downloading information. One of your phones is not on air -- put it on airplane mode. Might as well get this straightened out before we get a jury in here.

You hear that click, click, click, click? What that means is that somebody's phone is downloading information. So you need to put it on airplane mode when you're in the courtroom or turn it off completely.

The other thing is, if your phone goes off during the trial, I have a wonderful collection of phones, and some of them are really neat. And you'd be amazed the pictures on them. So you don't want to have your phone go off during trial. All right. So, okay. But please put it on, as I said, airplane mode because that's what happens. It interferes with the sound system. Okay. Again, let me see. As I said, I'd much prefer to have this extraneous stuff dealt with.

I am pretty prompt. I'll give you a minute or two one way or the other. If I'm going to be late coming back in because something has blown up back there, I generally send Shree or

someone in to say, you know, she's going to be late coming back so you can do another bathroom break or whatever.

I don't keep the jury waiting. I don't think it will be a problem with this group, but I have twice in 21 years come in, waited, brought the jury in, and we all just sat and waited for the lawyer who was late to show up. They didn't do that again. I've only done it twice in 21 years. But you know, I mean, a minute or two one way or the other, you know, sometimes, you know, it just takes an extra minute or two to get there, so -- but try to kind of be here on time.

As the Special Masters will tell you, I have been chomping at the bit to want to get, start getting to these jury instructions. Now we can't get to them yet because we don't know some of the aspects of the applicable law, and Carmen is already looking at me up over her glasses because I've said the dirty words again. But the reason I'm bringing it up, I want you to understand, I think the jury instructions and the jury interrogatories are the most important thing you will do in any given trial. They do not come out of your word processor, and they have to be joint. That does not mean yours, mine, and ours put together with a cover letter. That means they are footnoted and you say, you know, they want "reasonable," and we want "legitimate." Okay. You drop a footnote and you tell me the case you are relying on in New York law that says "reasonable" and the one you are relying on that says "legitimate." I will

look at it, and you will have some sense of it.

It is my practice to have the jury instructions in the can before you start your trial cause I don't understand how you can try a case if you don't know what the jury instructions are going to be. That's my thought on it. Sometimes we don't know what the facts are going to be, so we'll have one that says, Okay, if the facts come out this way, this is the one we're going to use. If they come out this way, this is the one we're going to use. If they come out this way, we're not going to use it at all, but we will have them in our back pocket. So this is just so that you will understand how important I think they are.

The other thing that you need to know when I get your proposed jury instructions and jury interrogatories is I check them. Every jury interrogatory you have must have a corresponding jury instruction, and I check them, blunk, blunk, blunk, blunk, blunk, blunk, because the jury has to understand how they need to answer this question. And it's also a wonderful exercise for you because it will keep you, I hope, from trying to put on that jury interrogatory form of question that is not grounded in law, okay?

For instance, this is just an exemplar. As I understand it, under New York law, loss of enjoyment of life is recoverable, but it is not a separate recovery. Richard smiles. He knows how I feel about that. So it won't have its own little question. It will be included in, you know, the mental pain and

anguish. Isn't that --

THE CLERK: Pain and suffering.

THE COURT: Pain and suffering, thank you very much. That's where it will be. So, you know, you want that to be known to them, I suggest you put it in a jury instruction, okay? So it keeps that from being grounded. Same thing from the defense side, all right? So it also forces you to look at the elements, okay.

And it's also what I call the traffic instructions. You got to have your traffic instruction. Richard is going, what is a traffic instruction? You know, if you answer "yes" to this, skip to question 12. If you answered "no" to this, skip to question 42.

And my suggestion to you is, after you think you've gotten it all done, give it to a layperson, somebody who doesn't know anything about the case, and let them see if they can work through it. That's one of the best things you can do, because that way you know whether it's going to work or not, and you don't run the risk of having hopefully an inconsistent jury verdict form.

All right. Those are just some of the things that I suggest you start -- as we turn our attention more towards trial, you start thinking about. The Special Masters will be talking to you about that. I suggest you listen to them. They know me well. They have tried cases before me and worked with me. So

they can probably give you some wonderful guidance on that.

All right. Now let's turn our attention to the motions in limine. I am going to apologize if I don't automatically get the computer up and running as quickly as I would like. I had planned on sitting down and going through all of these again. As you can see, I've already been through them multiple times, but to get it back up and running, but I got involved with the Special Masters. All right.

Okay. The first one in our normal pattern that I want to go to are the ones that were left from the last time. This one would be the Defendants' Motion in Limine to Exclude Evidence and Argument Regarding Unrelated Corporate History, Document Number 3288. Plaintiffs' response, Document Number 3342.

Now, as to the concept of World War II, I think everyone recognizes that will be granted. Mr. Lanier, that shall not come up in any fashion whatsoever. No expert shall blurt it out. No expert shall even allude to World War II. Thank you. All right. So it's granted as to World War II.

Now, as to the -- as to TAP and the CIA, that's a little more interesting concept. Now, as to the argument, Ms. Gourley, and Mr. Parker, that was made in response to the plaintiffs' response -- actually, it was made in reply -- yeah, I agree with you as to saying, you know, because they robbed banks before, they must be robbing banks now. So as to that aspect, I would grant it, and I would agree.

That is not to say, however, that there might or might not be some other basis of independent relevance. I don't know, and I will not be able to know until the trial.

So if the plaintiffs are intending to put that forward to show that they are bad people because they were bad people there back with TAP and they got in trouble with the government and it was criminal, and yadda, yadda, yadda; no, I will on the motion in limine grant their motion there.

However, if there is an independent basis for relevance, then I ask that you bring it to the Court's attention at sidebar outside the presence of the jury. If, in fact, we end up stopping around 3:30 each day, which again, I think, is an excellent idea, then we can -- you can anticipate those things as the trial unfolds, you can say, today we think we've proved up X, Y, and Z. So we tomorrow want to go into D, and you told us we couldn't go into D unless there was an independent relevance. And the defendants have an opportunity to say, Oh, no, no, no, they still don't get to go into D, because on a 104-403 analysis the prejudice outweighs the benefit, et cetera, et cetera.

In any given case, for those of you and all of you here I'm assuming are litigators. You know. You don't know -- I mean, witnesses can go south. You just don't know what's going to happen. So I'm not going to say it can never come up, but it cannot come up for the purpose that the defendants highlighted because I agree with them on that point. But if there is an

independent relevance, you know, don't go into it, Mr. Lanier.

MR. LANIER: Approach the bench.

THE COURT: Yeah, approach the bench before that, or do it, you know, after we let the jury go at 3:30. All right. So, as to -- Chris, as to Document Number 3288, granted in part and, I guess, deferred in part, okay. It's granted as to World War II. It is deferred -- well, I guess it's deferred.

No, Chris, let's do it, it's granted. Okay. As to this one, the Court grants it. However, with no prejudice to the plaintiffs' right to reurge an independent relevance outside the presence of the jury. All right.

MR. PENNOCK: Thank you, Your Honor.

THE COURT: You're welcome. Okay. So if y'all can find a way to get it in; I'm not saying you can, I'm not saying you can't; but, you know, I'm a fan of Hannibal, so we'll see what happens.

Ms. Pruitt, Mr. Parker, y'all weren't here. Hannibal comes from an old friend of mine who was a plaintiff's attorney, and he used to say that, you know, I could find a pinhole, and then the next thing he knew I was driving Hannibal and all his elephants through it. And I said, Well, that's my job. So pinholes can lead to Hannibal and all of his elephants and, as I have suggested, with Ms. Gourley or Mr. Parker waving the flag on it as they go through, or Mr. Lanier and Mr. Arsenault waving the flag on the back of the elephant as they go through, so --

All right. So, Chris, granted on both parts, but with no prejudice to the plaintiffs' right to approach the bench and ask if they have established an independent relevance.

All right, the next one. Okay. This is Defendants' Motion in Limine to Exclude Evidence and Argument Regarding the Attendance or Nonattendance of Certain Witnesses at Trial, Document Number 3286, Chris. All right. On that one I originally -- Ms. Gourley, you're standing.

MS. GOURLEY: I'm sorry, Your Honor.

THE COURT: That's all right. Go right ahead.

MS. GOURLEY: I didn't want to interrupt you. This was one where we thought originally we had an agreement, and then it turns out we did not.

THE COURT: Yeah.

MS. GOURLEY: And we were urged to refile with the sections separated, and the date we were given for that was October the 16th.

THE COURT: Yes. Well, I didn't --

MS. GOURLEY: That's what we intend to do unless something you are about to say supersedes that.

THE COURT: That's exactly what I was about to say.

MS. GOURLEY: Okay.

THE COURT: This was one that I originally deferred on because the parties thought that they would be able to reach an agreement. And again, Mr. Parker, and Ms. Pruitt, this

particular case, because of the manner in which the parties and the Court have chosen to approach it, the majority of the movement is by agreement, and then it is memorialized, if you will, by the Court. So I ask you to please continue to participate in that professional manner that has been the culture of this case up to now, and I think that's why we've been able to get this case as far along as quickly as we have, so --

All right. So, originally, I deferred because the parties said they would discuss. However, there was no agreement. Now, because of that, I asked the parties, I think, through the Special Masters, and I guess they have already explained that to you, because I sit down, I go through everything multiple times; hence, get it to me on time. I sit down with them and go through it. We spent a long time going through this with the Special Master.

So I think, Chris, the proper procedural ruling is that it is denied for failure to carry their burden. However, the defendants have until October 16th at 4:30 Central Time to file or, and/or reurge this if they wish to, and to fully brief the segregated issues. And then the plaintiffs will have until Tuesday, the 22nd of October, at 4:30 to respond. And I ask that you, please, unless it would prejudice you to do so, use the same segregation that the defendants have used so I can match up the responses and go through it quickly.

MR. PENNOCK: Very good, Judge. Thank you.

THE COURT: Okay, thank you. All right. And then once I get those, I will look at it again. And I'm sure they have gone through it with you. I just think it may or may not be different vis-a-vis corporate reps, vis-a-vis third parties, vis-a-vis corporate employees, vis-a-vis former employees, so -- and then there are some other issues that might or might not play into this.

So I need you to think with specificity as to what issues, because there are multiple issues in this case. It might or might not be relevant. You know, we have multiple issues. I don't want to flag it for anybody, but we've got multiple issues here.

So you will find, Mr. Parker, Ms. Pruitt, as they have already found, don't paint with a broad brush with me. I parse things out, so don't paint with a broad brush. So, you know, just as an exemplar, probably not relevant to this issue. I don't know whether it is or isn't, but something might or might not be relevant if we get to punitive damages that would not be relevant as to liability. That's just an exemplar.

There are other issues that tend to segregate themselves. So, again, I'm not going to flag it for either side. There's a thin line between my flagging it for you and/or, you know, telling you what I need you to consider, so -- but, please, when you break it down, break it down as to all the individual categories, and then, you know, as to what issues, maybe, maybe

not.

And if you don't want to flag it, defendants, for the plaintiffs' side, then we'll let the plaintiffs flag, well, it may not be relevant for this, but hey, it's relevant for this, okay. And if you don't want to flag it, you don't have to flag it for them. Let them flag it. But you know, the more we can get out on the table now and cleared up, the easier the trial will be for all. But it may be that some of this will just have to kind of wait. But at any rate, that's that one.

Okay. Is that every thing on that one, Shree? Okay, need to look and see. Cause a lot of this right now is fact dependent. I don't know about these people, and I don't know as to what issue.

As an exemplar, again, the thing for me that will make me, you know, turn my nose up, so to speak, on a motion for summary judgment is if the first sentence says, there's no genuine issue of material fact, period. I know it's a loser. As to what issue. There are multiple issues in most cases. So if you want to put that and put a period, you've lost because you haven't told me as to what issue, okay? All righty, so, fact dependent, issue dependent.

All righty, now, the next one is Document Number 3368. That's the Defendants' Motion in Limine to Exclude Argument Regarding Witnesses Testifying by Deposition. Now, you know, when you force me to go back to the Federal Rules of Civil

Procedure and pull it out and read the actual rule again just to see what we're going on, I'm interested from the plaintiffs' standpoint why you might want to -- if you're not, you know, throwing out your strategy here, why you might want to comment on this? I mean, generally, you know, if it's over a hundred miles, and pretty much everybody is going to be over a hundred miles from Lafayette, you know, they get to bring it by deposition.

Is it -- boy, Mr. Lanier has got his poker face on. So he isn't going to be telling me, but I -- right now I'm interested -- I can see where maybe there might be some relevance, but I don't want to flag it for anybody and I'm not sure there is.

So, Mr. Pennock, you at liberty to say?

MR. PENNOCK: Your Honor, I think I can address the question.

THE COURT: Cool, cause this one is fascinating. If you hadn't figured it out, I'm a nerd.

MR. PENNOCK: I hope I'm on the right motion.

THE COURT: Well, let's see, it says --

MR. PENNOCK: No, I'm sure I am. I think that from our perspective, or as the Court knows, there's been a very large number of depositions taken of the defendant in this case. There were current employees. There were former employees. Some of those former employees we believe were under agreements to cooperate fully in any litigation that may occur subsequent to

their departure.

So, in essence, I think that, with respect to the Takeda employees and some of the former employees, they are available to the defendant to bring them here to testify at trial. They are not available to us because we do not, as the Court noted, have subpoena power over them. Yet they are available to the defendant. And therefore, from our perspective, the defendants should not be able to rely upon the depositions of their own witness, of their own employee to -- at trial.

Now I think -- I thought that Rule 32 was fairly clear on this, and that if -- that you may use a deposition -- as an adverse party, you may use a deposition against someone, but to proffer it in your own behalf when you have control over producing that witness I didn't think was something that would be permitted.

Now they cited a case, Herbert v. Wal-Mart Stores which is a Fifth Circuit case, and I can read the cite if you want, Your Honor, but it's in the brief, as I'm sure you know. And that case is not -- it does not stand for anything different than what we have argued which is, when the witnesses are equally available to both sides, then you cannot claim some -- you cannot claim some adverse inference or suggestion because one side did not bring the witness.

But when they are not equally available, as in this instance, then I think the defendants are either under the

obligation to bring that witness or at their peril we may appropriately and not cumulatively or create any duplicative or repetitive discussion of this or argument at trial, but if there are witnesses who are significant and who we think should have been brought here to stand up for this company, then I think we should, under the rule, under the Herbert case as well, be able to comment on that. And the defendants ought not have as their fallback position, well, we're just going to show them by deposition. So I think we are squarely within the rule here and the case.

THE COURT: Do you have Rule 32 available to you? Mr. Lanier does.

MR. PENNOCK: I do, Your Honor.

THE COURT: Okay. Pull 32, because I looked at this, and, you know, 21 years I've never had to look at it this carefully. This is really rather interesting because I'm a procedural nerd.

All right. So if you look at 32(3), all right, Deposition of a party -- Cathleen, I've had three cups of coffee, so if I get to going too fast, raise your hand, okay.

It says, "Deposition of Party, Agent, or Designee. Any adverse party" -- and that's what you're -- where you're hanging your hat, I assume. "Any adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer" -- okay -- "director, managing agent, or

designee under Rule 30(b)(6) or 31(a)(4)." And we could look at 31(a)(4), but I don't think we really need to right now. Everybody, I think, probably is clear in your back pocket it's 30(b)(6).

But then you go, "Unavailable Witness." And it says, "A party may use for any purpose the deposition of a witness, whether or not a party" -- okay -- "if the court finds:" They are dead, a hundred miles from the courthouse, infirmity, illness, et cetera, and then exceptional circumstances.

So my question was, when I read this, it seems that Rule 32 is making a distinction between a party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4), and in those whether or not a party, if they are unavailable, and they lay out "the unavailable." It seems that that is the distinction that's being made.

Now, whether or not -- let me look at 31, go back and look at 31(a)(4). Don't think that helps us. I think I looked at that earlier. 31. No, that doesn't help us. Okay, I didn't think so.

So I think the distinction is being made between a party, however that's defined, and I think it is an officer, director, managing agent, or designee. Well, I don't think that's going to include former employees or people with whom they may or may not have had this continuing -- this agreement for continuing cooperation if they don't fall under that category

unless they are -- and if they are unavailable, the question then becomes whether or not -- cause, see, (3) is separate from (4).

MR. PENNOCK: Yes, Your Honor.

THE COURT: So (4) is unavailable.

MR. PENNOCK: Yes, Your Honor.

THE COURT: So if they are unavailable, that's one thing. An adverse -- that's you -- can use it for their party people, or if they are unavailable, they can be used by anybody. Okay. So my question would become, if they are unavailable, does that -- it says whether or not they are a party. So does that not also include agents, officers, et cetera, you see, where it says, "A party" -- doesn't have to say adverse. "A party may use for any purpose the deposition for a witness, whether or not a party," if they are unavailable, and then we go through these (A) through (E). Would not (A) through (E) include, also, the officers, directors, managing agents, et cetera, it would seem. I don't know. I'm asking.

MR. PENNOCK: Yes, Your Honor, and you're right. This dilemma frequently occurs under Rule 32 in these settings. I think that the -- in our view under (D), which is 32(a)(4)(D), that these defendants have the burden of demonstrating that these parties -- I'm sorry -- these witnesses would not consent to the jurisdiction of the court and become available for testifying here live.

THE COURT: So you're arguing that under (D) that it

says that the party offering the deposition could not procure the witness's attendance by subpoena. Well, they can't procure them by subpoena. They are over a hundred miles from the courthouse.

MR. PENNOCK: I think that if there were consent to come, if the par -- if the witness consents, if the witness is sitting in Chicago and consents to come for trial to give testimony --

THE COURT: They are going to say they didn't consent to come. They didn't ask them or didn't consent to come, and the question then becomes, because I'm not being merely facetious here, must they? I don't know the answer. That's why I'm interested in your thoughts, and then I'm going to let someone from the defense argue it as well, because this is an interesting little ambiguity, it seems to me.

And I agree, the Wal-Mart case doesn't help them. It doesn't help them, it doesn't help the Court. So I don't know that I have any -- have been given at this stage any case law that gives me the answer.

So I don't -- I don't know whether or not within (D), the fact that it's attendance by subpoena, should encompass consent or control, but let's step out of that, Mr. Pennock.

MR. PENNOCK: Yes, Your Honor.

THE COURT: And let's just say that we're talking about a normal company employee, okay, and we're going to take it out of this realm entirely. We're going to -- we're going to put it

in the admiralty realm merely because it wouldn't be applicable here, okay, and you've got a witness, and the witness clearly is aligned with the defense, but he works in Jakarta, and he works, you know, 27 -- 21 and 21 or 27 and 27, and the trial gets continued. They had him set up, but the trial gets continued, and it's now going to be slap dab in the middle of his 27 days when he is scheduled to be in Jakarta, and he's the only one that can run this super-duper mud pump. Could not at that point the defense or the plaintiff, if it were the other side around, be able to use the deposition because they would be unavailable because of either (E) exceptional circumstances, or certainly over the hundred miles, you know, and they can't really subpoena him. They didn't subpoena him. I mean, that happens all the time. And then you don't get to get up there and say, well, the reason they didn't bring him is because the mud pump on this one was defective, and that's why he's not here because this is a defective mud pump. Doesn't that happen all the time? Why is this different?

MR. PENNOCK: Well, I think the difference is there have been no facts adduced here or alleged here by the defendant yet because the witnesses that might be commented upon have not yet been identified because we're not yet at trial, but there's nothing that's been asserted --

THE COURT: Let me interrupt you. That's going to happen before trial, Mr. Pennock.

MR. PENNOCK: Sure, because of the deposition designations, true.

THE COURT: Deposition designations and --

MR. PENNOCK: Pretrial order.

THE COURT: There you go, which is --

MR. PENNOCK: Thank you.

THE COURT: It is sacrosanct.

MR. PENNOCK: Understood.

THE COURT: Okay.

MR. PENNOCK: And the Special Masters have made that very clear. But in any event, there has been no assertion, let alone demonstration, that there are circumstances such as those that Your Honor has described, or akin to those circumstances, that might preclude this witness from appearing at the request of their employer or appearing under a contract that they entered into when they left the employ when they said, we will come and cooperate. We will come and testify. I mean, I think that's a fair interpretation from the contracts that we understand may have existed. You know, we've learned that, I think, through one witness at least.

So I think there is certainly something afoot here behind the scenes that we know they can bring those witnesses, and we know that they will ask and tap whoever they want to bring to come to this trial. And if that person is working in Chicago or working for the company and it's going to be good for the

company, they will be here at this first MDL trial in this situation.

So I think that, under those circumstances, I do think that they are, in essence, tapping into the power and authority that they have over these individuals akin to a subpoena, akin to consenting, getting them to consent to accepting a subpoena, and accepting the jurisdiction of the Court, and bringing them here.

If they list that witness as a witness in the pretrial order, I mean, they are essentially asserting that this witness will be here, this witness is testifying for us, and essentially, tantamount to putting that person under the jurisdiction of the court in the same way that a subpoena would operate.

THE COURT: Hold that thought because you are overreaching there, and I will explain to you -- wait a minute. When I get to talking, I get to talk.

MR. PENNOCK: Sorry, Your Honor.

THE COURT: That's all right. Now, because the way the pretrial order will be formulated is that this running list of witnesses that I keep reminding y'all to please tell me who they are, okay, you will pare it, both sides, pare it down, and when you come to your pretrial order, you will have a will call witness list, and you will designate which of those witnesses will be coming live and by deposition. So just putting it on the witness list, no, that doesn't certify that they will be here, et cetera.

Okay, all right. Defense, whomever is speaking for this, let's come up because I want to talk with you about this.

MS. GOURLEY: I'm a little nervous because I didn't bring my rule book. I thought about it.

THE COURT: If you smile real nice at Mr. Lanier, he might let you borrow his cause they seem to have a couple. Judge Feldman taught me, never show up in court without my handy dandy Federal Rules of Evidence and Federal Rules of Civil Procedure, so it's a habit that I had kept from when I practiced.

All right. Now, Ms. Gourley, this is the way this particular rule reads. Somebody do give her one. It's not fair for her not to have one.

MS. GOURLEY: Thank you.

MR. LANIER: You're very welcome.

THE COURT: All right. Go to Rule 32, Federal Rules of Civil Procedure. Got it?

MS. GOURLEY: No.

THE COURT: Shree, go get us another -- wait. Give this one to Ms. Gourley and then give that one back to Mr. Lanier. He was playing in the Federal Rules of Evidence.

MR. LANIER: You need me to find it?

(Counsel conferring.)

THE COURT: All right. It should be open to 32.

MS. GOURLEY: Yes, Your Honor.

THE COURT: All righty. Go to 32. And then I want to

go to (3) and (4), because it seems that this is what was meant by this rule. Notice the emphasis on the word "seems." All right. It says, "Deposition of Party, Agent or Designee," and that's where it says "an adverse party." That's in part the argument that Mr. Pennock is making. So an adverse party can put it forth, period. Okay. That's all right. You're not an adverse party. So I don't think (3) applies to you. You can't just use it there. They can use it, plaintiffs, but you can't because you are not adverse to yourself. Then, so you're going to be under (4), it would seem.

MS. GOURLEY: Uh-huh.

THE COURT: And that means an unavailable witness whether or not a party. Okay. So whether or not a party if they have to be unavailable. So they have to be dead, over a hundred miles from the place of hearing or trial or is outside the United States, unless -- and this is what Mr. Pennock, I think, is arguing -- unless it appears that the witness's absence was procured by the party offering the deposition, and that, I think, is the basis. Although Mr. Pennock did not actually cite that language, I think that is the basis of his argument on this point. He is saying, Hey, they are cherry-picking the ones they want to bring and the ones they don't want to bring. So, hey, that is clearly being procured by them. And I tend to agree with him on that point. You don't get to cherry-pick the ones you want to bring and the ones you don't want to bring.

Then you go to (C), that the witness cannot attend because of age, illness, infirmity, or imprisonment. Of course none of us argues about that one. And then (E) on motion and notice, and again, I think that's what Mr. Pennock was attempting to allude to. I'm looking at you, Mr. Pennock, but you're behind her. I think that's what he was attempting to allude to when he was over, being a bit overbroad about the Scheduling Order, okay? It requires notice, okay, that exceptional circumstances make it desirable and in the interest of justice, et cetera. So I think he has an argument on that point.

Now he went to (D) which was "that the party offering the deposition could not procure the witness's attendance by subpoena." Well, you can't procure them by subpoena, but I think that if you look at (B), okay, which is "unless it appears that the witness's absence was procured by the party offering the deposition," and this concept of not being able to get their attendance, and although it says by subpoena, I think that he makes at least a reasonable argument that, in fact, neither side should be able to cherry-pick whom they wish to bring and then make the other rely upon the depositions.

Now I am interested in your thoughts.

MS. GOURLEY: Your Honor, I think there's two things with respect to this motion that have been somewhat conflated. One is the issue of whether witnesses have to come live or for whom depositions may be read, and I think there is a distinction

between officers, directors, managing agents, and other witnesses.

The discussion I have had with the plaintiffs on this issue is around the fact that so many of the people, so many of the people deposed in this case are, in fact, former employees. The plaintiffs' discovery has focused on time periods literally decades ago, and the depositions of people who are no longer employed by Takeda and over whom we cannot insist that they attend any trial. I, in fact, know of no case law that says that we're obligated to insist that someone who is not employed by us, even though we have deposed them, and perhaps they have cooperated in a deposition, be required to attend a trial in Lafayette, Louisiana, as lovely a place as we all know that to be.

THE COURT: Well, I agree with you on that point, but he raises some sort of extraneous contract. First I've heard of it, but he raises an extraneous contract that says these people will, and I'm certainly paraphrasing here, in effect, act as if they are still employees because we will come and cooperate.

MS. GOURLEY: Well, I don't know what Mr. Pennock is referring to there. I don't personally know of any provision that requires someone to travel to testify in a trial, but if there is one, I'd be happy to discuss it with him.

THE COURT: That's not what he said, and we're not going to get into the difference between bladder cancer and

cancer. I don't appreciate not being dealt with forthrightly. Okay. Now -- not saying that you did, Sara, but we're not going to get into parsing the difference between bladder cancer and cancer when we were talking about -- well, it wasn't me -- talking with Judge Hanna about, you know, these litigation holds. But at any rate, I digress here.

But that's not what he said, Sara. What he said was that there is at least one witness who has said that there was some sort of a contract that said, we will cooperate with you, Takeda, in the future as to what you might need us to do. Again, I don't -- I don't want to put words in his mouth. That doesn't mean that the contract said, of course, that we would come to Lafayette, Louisiana. Of course it wouldn't say that. You didn't even think you'd be coming to Lafayette, Louisiana, ever in your wildest dreams, but here you are. It probably didn't say you will come to trial for us. It probably didn't say that.

What it might have said, and I have no idea, but what it might have said would be that we will cooperate with you in whatever way you need based upon the work that we did for you during the time we worked for you. And if that -- if that exists, then I think he might have an argument because that would be like being, in effect, a present employee. Agreed, or no, assuming it exists?

MS. GOURLEY: A, assuming it exists.

THE COURT: Assuming it exists.

MS. GOURLEY: B, assuming it exists with an employee who is relevant to the issues here who is on the witness list.

THE COURT: Yes, gotcha.

MS. GOURLEY: And C, I would think that in that circumstance you would still need to look to unavailability, because former employees, remember, whether they agree to cooperate or not cooperate -- and leaving aside for a second exactly what that means -- could, for example, have taken a job in Jakarta.

THE COURT: I agree, I agree on that. So if we start out with -- and we're just dealing in hypothets here. Okay. And in no way are defendants prejudiced by answering these hypothets, okay, nor am I assuming that these contracts exist for everybody or anybody they might want, okay? Now, but setting aside, I'm just trying to deal with the parameters of the law here.

Assuming that there was some sort of a contract that said, in effect, we will cooperate with you to address the work that we did for you when we worked for you, okay, and that's what I was talking about cancer, bladder cancer, you know, litigation holds, et cetera. I don't want to get into that. So it doesn't have to be so specific that we would come to Lafayette, Louisiana. Please. Or that we would come to trial. I don't think it need say that.

But if whatever that document that was alluded to by at least one witness were to say, if the spirit of that was, we

will, in effect, make ourselves available to you as if we were still your employee if you need us, based upon what we did for you, then it would seem at that point they are not, unless otherwise unavailable, unavailable.

Now they are not under (3) because I don't think they are going to be a director, a managing agent, or designee. They might be, but that doesn't help you anyway. (3) doesn't help you. That only allows the plaintiffs to put on those depositions because they are adverse. So we're down in (4).

So if, in fact, these documents exist, then they are kind of like present employees. So they are not necessarily otherwise unavailable because of their nonpresent, at-present employee status, okay? So we look at (4). So if they're dead, certainly, okay?

Now, if they are over a hundred miles, which is what one would ordinarily argue, but then you have that caveat, unless it appears that the witness's absence was procured by the party offering the deposition, and that's his argument. He really should have been hanging his hat, I would argue, on (B) rather than (D), okay?

So then we get to (C). Of course, if they're too old or too ill or infirmity, or imprisoned, notwithstanding having signed this document, whatever it would be, you don't have to bring them, okay?

And then (E) is Jakarta. (E) is on motion and notice,

that exceptional circumstances exist, and that would be what you just said, if they are in Jakarta. Yes, they don't work for us anymore; but, yes, they signed some sort of document that would put them in the same shoes, if you will, as a present employee, as to our having control over them, then, yeah, we can't cherry-pick. I would suggest that's a strong argument, that you can't cherry-pick the ones you want to bring or don't bring without risking an adverse argument on their part, but you get to argue that under (E), if you give them notice, and that's why I was so persnickety with Mr. Pennock about the obligations under the Rule 26 disclosure of witnesses, telling me who they are, and the obligation that you must declare, if not before, certainly by the pretrial order, who is going to be will call and whether they are coming live or by deposition. I think you might even have to do it earlier. I know I argued for that point, but I might have lost that. Carmen might have beaten me back on that point. She is your champion, parties, in case you didn't know. She might have beaten me back on that.

So at some point that designation must be made, Ms. Gourley, and once you make that, then I think they are not without reasonable argument to say, you have to bring these people, if you want to use them, unless you can show exceptional circumstances.

MS. GOURLEY: Uh-huh.

THE COURT: Do you disagree with that analysis, and if

so, why, based upon the admitted assumptions that underlie it.

MS. GOURLEY: Based on the assumptions, including specifically with respect to a contract that has only been described to me by Mr. Pennock.

THE COURT: Yes.

MS. GOURLEY: Then I think you may be -- you are right. However, I, again, have not reviewed the case law on Rule 32, specifically.

THE COURT: Okay. Then why don't we do this.

MS. GOURLEY: A brief?

THE COURT: Yes, if you would like to do that, because this one I find interesting. I don't know. Yeah?

MS. GOURLEY: I just want to add one other thing. There is another piece to this motion in limine which has been kind of lost in this, and that is, we cited and the proposal we made was with respect to the Fifth Circuit pattern jury instructions.

THE COURT: Oh, I read it.

MS. GOURLEY: -- with regard to depositions.

THE COURT: Oh, I'm coming to that. I haven't gotten there yet.

MS. GOURLEY: Okay.

THE COURT: I'm doing it -- you know, I'm very methodical.

MS. GOURLEY: Okay.

THE COURT: We've got to deal with this part and then we're coming to the other.

MS. GOURLEY: Okay.

THE COURT: Okay. So three or four pages; shouldn't take more than that.

MS. GOURLEY: Are you asking for a response from the plaintiffs first and then a reply since this was --

THE COURT: Oh, that was your motion? Yeah. All right, Mr. Pennock, yeah, three or four pages.

MR. PENNOCK: Very well.

THE COURT: And then I'll let you do a reply, three or four pages.

MS. GOURLEY: Thank you, Your Honor.

THE COURT: Timing, 16th and 22nd as well? No, Carmen is shaking her head no. Work out with Carmen when to get the timing on that.

Mr. Pennock, yes?

MR. PENNOCK: Your Honor, I just wanted to let the Court know that the contract that I was alluding to was discussed at, I believe, at a deposition of Terri Smith. I don't expect Ms. Gourley to know every piece of testimony that's happened in every deposition in this litigation. That wouldn't be in any way fair. But the fact is it was discussed at a deposition and the language I have available, but we'll put it in our brief.

THE COURT: Okay. Bottom line -- Mr. Arsenault?

MR. ARSENAULT: I apologize, Your Honor.

THE COURT: It's okay.

MR. ARSENAULT: I was at the deposition, as was Mr. Lanier. We did not attach that document, and I'm not certain that it was in fact discussed, but we have the document. We have the Bates number. We'll provide it to Ms. Gourley momentarily, as soon as we can make a copy of it, or we'll E-mail it to her, as a matter of fact.

THE COURT: Cool.

MS. GOURLEY: Thank you.

MR. ARSENAULT: I just wanted to make sure the record was straight on that. I don't think it was actually discussed. And I'm positive it was not attached, but we had it in connection with the deposition. We have it here, and that's the agreement.

THE COURT: Okay. Remember that, if you're going to use this as a foundation, at some point you've got an authentication issue, huh? I don't know, but I just point that out.

MR. ARSENAULT: Yes, Your Honor.

THE COURT: Okay. That's Bill Pugh's, you know, Evidence 101.

Okay. Now, bottom line on this part of this particular motion, what I just went through with Ms. Gourley is how I see the law, unless you can show me some case law to the contrary. Okay? So that's really what I'm looking at. So don't give me

flowery language in your three to four pages; I'm not interested in it. The Wal-Mart case -- I think was that on this one or the other one? Yeah, I've read it. That doesn't help. It's not on all fours. It just doesn't help here. So go looking and see if you can find something, because this is interesting. This was fun. This was great fun. So, go see if there's some case law out there. Start with the Fifth Circuit always, please; it's very, very helpful to me. If there's nothing in the Fifth Circuit, say there's nothing in the Fifth Circuit, so we went to look at that this circuit, that circuit. Avoid the Ninth if you can. They're most overturned circuit in the country. But, you know, if you have to go there, it's fine. I have some great friends in the Ninth Circuit, literally.

All right. The way I just -- the analysis that I just walked Ms. Gourley through is how I see this, unless there's some case law out there to the contrary or something in the comments, hidden in the comments when these were coming up or something that would change that analysis. So that is the invitation I'm giving you in these three to four pages. It's not to give me a bunch of bull. I'm not interested in it. Okay?

All right. The next point is, as Ms. Gourley alluded to, you can anticipate that I'm going to be instructing vis-a-vis the Fifth Circuit pattern instruction on the use of depositions unless there is some reason why that should not be the case. If there is some reason why that should not be the case, when you

have -- you create your pretrial order, one of the questions that you are going to be answering are any questions of law or evidence that remain outstanding that have not already been dealt with by the Court in motions in limine or dispositive motions. If there's a deposition which has been designated, because everyone must designate by the time you do that, if not before, which ones are coming live and not, and then we can fight about it. I would suggest you certainly need to do it before then because you have to do your deposition designations. And if you don't know which ones you're going to use, how can you do your deposition designations, which I think are scheduled to be done before the pretrial order is completed. So logically that just seems the case to me.

So if there is a deposition that we know is going to be used and there's some reason why the Fifth Circuit pattern should not apply, then you need to bring it to the Court's attention as soon as you are aware of this by bringing it to the Special Master's attention and no later than including it in the pretrial order. And then I will look at it and see if there's some reason why that shouldn't apply, okay? And inherent in that is Mr. Pennock's argument, so we're going to have to know, all right? So those two things kind of dovetail, because I think Mr. Pennock's right. If you look at it in its entirety, you can't cherry-pick whom you want to bring because this one, I don't want to bring him because he or she might hurt me, and this

one, if you have control over them.

Now, if they are not your party or agent -- I mean, I they are not your agent or your designee, et cetera, they don't have control over prior employees unless there is some document to the contrary.

And, Mr. Arsenault, I'm not suggesting that in order to argue that point you have to have it authenticated. But, you know, we've got to have some sense that somebody signed it. You're going to have to show, lay a foundation for Ms. Gourley that, you know, whomever this person is that you want brought live signed one of these documents.

MR. ARSENAULT: Yes, Your Honor. And we're E-mailing that right now to Ms. Gourley.

THE COURT: Great. Okay. All right. Do I need to review the pattern instruction that was argued about in the brief? I have it. We can do it, Mr. Pennock. No?

MR. PENNOCK: I don't think so, Your Honor.

THE COURT: I don't think so either, I mean, and it's pretty standard, and you can expect I'll give it unless there's a reason not to give it. And that's inherent in all of this argument. So I think you know the analysis, you know what I'm likely to do.

Plaintiffs, you have the burden of finding this document as to people you want there.

Defendants, once they find that document, I think the

burden's on you to show that they are otherwise unavailable under the rules. I think that's how this is going to play out.

All right. So as to Defendants' Motion in Limine to Exclude Argument Regarding Witnesses Testifying by Deposition, that's 3368, I guess I'm going to give you a chance to brief it just to see if there's any case law out there. Talk to the Special Master; she'll tell you when your deadlines are on that. Okay?

MR. PENNOCK: Thank you, Your Honor.

THE COURT: They don't let me mess with the calendar much, so --

All right. Chris, I'm deferring on that one, awaiting additional briefing. That one was interesting.

Okay. The next one is Document 3370, Plaintiffs' Motion in Limine to Exclude Any Reference to the Quantity of Information Produced, the Number of Custodial Files Produced, or Terabytes of Information Produced. Basically, I can't deal with this one without a context. So I need to hear from both of you as to why and within what contextual basis this might be relevant.

You want to -- you want to -- you stood up. You want to go first, Mr. Pennock?

MR. PENNOCK: I'm sorry, Your Honor. Whoever you want to hear from.

THE COURT: Pop up's good.

MR. PENNOCK: It was my motion.

THE COURT: Again, this will come to trial. When you stand up, I will always comment on it because it's what punctuates and I will stop whatever I'm doing. So in --

MR. PENNOCK: I'm sorry.

THE COURT: No, that's good. So in trial, if you stand up, you can expect I'm going stop the witness or whatever because I'm assuming that you want the Court's attention, unless you are one of the second chairs sitting in the back and you are moving computers back and forth, which is what was happening with Mr. Arsenault and the gentleman behind him. You know, that's fine. But if one of the primary trial attorneys pops up, and if you pop up and I don't notice that you popped up, clear your throat, okay, because sometimes I'm -- you will notice when I'm really interested in a witness, I'm watching the witness, and I may not see you in my peripheral vision. So clear your throat. Okay?

All right, Mr. Pennock.

MR. PENNOCK: Thank you, Your Honor. The -- a context, an exemplar, if you will, for this is that, ladies and gentlemen, understand, as you heard from Dr. Smutspuck from our company that was on the stand, we have produced more information in this case to these plaintiffs than exists in the Library of Congress.

THE COURT: Okay. Why is that not relevant? And I'm going to ask the defendants the same question. Why is that

relevant? Why is that not relevant?

MR. PENNOCK: Yet they have come here and --

THE COURT: No, no. Why is that not relevant?

MR. PENNOCK: Because it goes like this.

THE COURT: I know what it goes like. I want you to tell me why it's not relevant.

MR. PENNOCK: Because we couldn't possibly put into --

THE COURT: No, no, no. Why is it not relevant? Why is it not relevant, the fact that they produced all these documents?

MR. PENNOCK: It is not relevant because of the second part of that.

THE COURT: Okay. Give me --

MR. PENNOCK: The second part of that is, and what is before you, are literally a handful of E-mails, a handful of documents that they want to say over 20 years proves that my client did all of these terrible things, from a terabyte of information. That's all they put here before you. And so it's not relevant because it'd be -- it's like: Wait a second; we really probably couldn't impanel a jury to sit here for three years to go through each, and as the Court is better aware than most, trials need to be boiled down to the evidence that hopefully can carry the burdens in the case, and that indeed there are rules against cumulative evidence, and so on and so forth.

So, this kind of argument, when we hear it, it's very hard to overcome it. And I suggest we shouldn't have to because it's not about the terabyte, it's about the byte. It's about what was -- what can we learn from these pieces of evidence. And the fact that there might be, for example, 1742 little pieces of information in the new drug application, pages and pages and pages, doesn't really impact or have any effect on the commentary and the thought processes that are reflected in the two or three E-mails about that new drug application and what they were really thinking and what they were really saying about it and whether they thought that, you know, it was a smoke and mirrors job on the FDA. That's not a document in this case; I'm giving you an example. So it's the bytes that matter, not the terabytes. And it's impossible to unwind that from a jury once they hear, yeah, jeez, how come there's only 40 E-mails that we saw with all of these -- how come -- because when things like this happen, they don't happen over and over and over again through thousands and thousands of E-mails through dozens of employees. It's digging in.

And in this particular case, it's even more important than it usually is because there's -- there is some volume of evidence, perhaps, not a terabyte, but certainly large volumes of evidence that we have never seen, we will never see, and the bytes in that body of evidence is not going to be seen by the jury either.

So it's an argument of volume over fact. And we've heard it. We have here, in this case, think that we should exclude that argument. We've heard it over and over again from defendants before in trials, and it's something that strikes us as being unduly prejudicial.

I mean, first of all, it's simply, we don't think it's relevant, but we do think it's, at the very least, very prejudicial and really not probative in the first instance of anything that's happening up here on the witness stand or what happened over the last 20 years.

THE COURT: So you believe it's not relevant, for the reasons given. Plus, on a 104-403 analysis, you believe that the probative value, if any, which you dispute, is outweighed by the prejudice?

MR. PENNOCK: Yes, Your Honor.

THE COURT: All right. Ms. Gourley, are you going to be responding?

MS. GOURLEY: Yes, ma'am.

THE COURT: Why isn't he right?

MS. GOURLEY: He's just not.

THE COURT: Okay. Tell me why.

MS. GOURLEY: He's not right -- well, I'm going to say one word right at the very beginning that ought to put an end to this, at least for now, which is spoliation. And while that claim is pending, I find it astounding that he would stand up

here and say that the amount of information we have produced in this litigation is not relevant to anything. That's number one.

Number two, even setting that aside, I do think -- you know, it's sort of akin to the cherry-picking you were talking about before. Mr. Pennock wants to say these four E-mails are the only important things in this case. Pay no attention to the millions and millions of pages of studies that were contained in the new drug application, to the documents that were provided to the FDA, to the documents that have been compiled in connection with all of the ongoing studies, including the KPMC study now and the clinical studies that were done during the life of this drug.

Similarly, with respect to -- it's somewhat akin to the argument made before about witnesses. The plaintiffs will stand up and say, "why didn't they bring Joe" -- who did you say?

MR. PENNOCK: Dr. Smutspuck.

MS. GOURLEY: Dr. Smutspuck? Why didn't they bring him to trial? And I should be able to stand up and say, "We produced to these plaintiffs 900,000 E-mails from him. You didn't see a single one."

There's lots of ways it can be relevant, Your Honor. Predicting them all right now is difficult. I think the amount of effort, the amount of time, the amount of documents which have been generated over this drug and this product since 1999 is relevant to some issues in this case.

I know for sure that you're not going to be letting us

introduce cumulative evidence. I would say as well that, given the size of the exhibit lists as they currently exist, we may well be introducing terabytes of evidence unless and until those are whittled down.

I think this is potentially relevant. It's certainly relevant to the claims which I believe are being made by the plaintiffs. I guess that motion isn't due until next week, the spoliation, whatever that motion is going to be. But I think the -- I think the amount of information, if it's not relevant at all, I kind of wonder what I've been doing for the last two years.

THE COURT: Okay. Now, in big green letters here was spoliation. I wasn't going to flag it for either side. I do not know whether or not this will end up being something that is going to end up before the jury or not. I don't know. When I say "this," I'm using an indefinite pronoun, and I will always correct you when you do it, so I will correct myself on that point. When I say "this," I'm talking about the amount of information produced, i.e., then additionally, spoliation. I don't know whether -- and I think, again, just as foreshadowing, when we do talk about spoliation, and it is the elephant in the room, please, do not conflate the question of whether spoliation occurred or did not occur -- quite frankly, I think that's probably a rather simple inquiry here -- with what happens if that did occur. That's the less simple inquiry, and the

interplay that gets popped up every now and then in some of these cases with 37(c). Those things are three separate prongs. Don't conflate them.

Now, that having been said, I think -- well, first, let me go to some aspect. This whittling down process, again, this is why, to me, the pretrial order is sacrosanct. You will have whittled your exhibits down once you put them on that order, because on the pretrial order, you have to give this Court some indication as to what issue -- you don't have to play your hand of how you're going to use it, but as to what issue that exhibit is going to bear. Otherwise, how do they know whether they have a valid objection. Again, remember, no genuine issue of material fact, period, you lose. It's very simple.

So, if the other side is going to know whether or not they have a valid objection, they have to know to what issue. You know, and that raises the question, well, it may be relevant as to this issue, spoliation, Ms. Gourley, but it may not be relevant, Mr. Pennock, to, my goodness gracious, I gave you 28 kazillion pieces of paper. Because the argument there is: Yeah, I gave you 28 kazillion pieces of paper, which is sometimes one of the defense strategies -- not in this case -- that happens of hiding the needle in the haystack which happens to be one of this Court's pet peeves. You don't hide the needle in the haystack. It only takes the one smoking gun.

So I think he has the stronger argument that it's not

relevant that you put in 28 kazillion terabytes, because a lot of those terabytes -- now I'm getting outside my area of understanding and into my area of ignorance -- Richard's laughing -- it could have been E-mails about the birthday party they were having on the 20th floor, you know.

So particularly in this case, because of the way the parties chose to address it, which was putting as much out on the table as, you know, we possibly could that wasn't privileged, and then sorting through it; in this case, I think, Ms. Gourley, your argument that you get to say I put out 28 million, is weakened. I think it's severely weakened because the nature of this case was that even the E-mails about the birthday party on the 20th floor were put on the table. So I really don't think that you're going to be able to convince me to be able to make that argument in this case given the unique manner in which this case went forward with folding in predictive coding, okay, where everybody agreed that we would go as broad as we could and then try to whittle it down. So I don't think that's fair to then say, well, we gave them, you know, 28 kazillion terabytes, I don't know, because you knew you were including the ones about the birthday party on the 20th floor.

So, Mr. Pennock, I think you're probably on rather firm ground that that argument will not be accepted by the Court.

Ms. Gourley, Mr. Parker, that argument probably will not be accepted by the Court, because this case, the facts of it

just don't -- I'm not saying it would never be an appropriate argument, but in this case probably not.

Now, that is not to say, Mr. Pennock, that there may not be some other independent basis for relevance for that argument, and I don't know. So on that one I think I cannot rule on this, certainly until after I've dealt with spoliation -- that's number one -- and we see whether or not that's going to be something that is going to come to the jury's attention.

And that's the other thing that I have alluded to with the Special Masters, you know. Depending upon how this motion on spoliation gets laid out by the two parties, whether it becomes a 37(c) issue, versus a spoliation issue. If it's a 37(c) issue, I don't think that involves the jury. If it's a spoliation, it might involve the jury. Okay? So, again, that's why you don't want to conflate these things, guys and gals. Don't conflate them. So I don't think I can rule on this one until after I've ruled on spoliation. That's number one.

Then number two, after I've ruled on spoliation -- because I see this issue as separate. We've got the general argument that Mr. Pennock made, and we've got the potential spoliation argument, maybe, maybe not. The spoliation argument will be illuminated by the ruling the Court makes on spoliation. And I'm assuming -- I could be wrong -- but I'm assuming 37(c) will be folded in as an alternative. Maybe I'm wrong. And if not, that's fine, too; but depending upon how it's presented.

So once I deal with that, then that is not to say, Mr. Pennock, that there might not be some way or some bases, as Ms. Gourley alluded to, that it might be relevant. I can't envision that. I don't know the facts here.

So much like with the people that don't come, whatever, and I gave you the opportunity to bring it up outside the presence of the jury, Mr. Parker, Ms. Gourley, and Ms. Pruitt in the second trial, if we get to the point where you think this is going to be relevant, then please bring it up outside the presence of the jury, and I'll give you the opportunity to argue that point. Now that doesn't mean I'll let you; doesn't mean I won't let you. It means I'll give you the opportunity. You're going to have to show me why it is relevant.

Now, so on this one, Chris, it is granted in part and deferred in part. It is granted, Ms. Gourley, as to Mr. Pennock's argument that we gave -- you know, the defendants gave 37,000 terabytes of information. That is not an argument, given the unique discovery engaged in, in this case, and the manner in which discovery was agreed to be engaged in. I just don't think it's a fair argument. It's overly prejudicial on a 104-403 analysis and has very little probative value as to the issues before the jury. So on that point, granted.

It is deferred until -- no. It is granted, but with no prejudice to the defendants' right to bring it up again at trial outside the presence of the jury should they find that they

believe that there is an independent relevance that has been established.

It goes without saying, you don't put it in your opening statement; you don't argue that to the jury without having gotten permission from this Court. Whether it'll end up in your closing arguments or not, we'll just have to see how the trial goes.

All right. Chris, I will defer on that aspect that might relate to spoliation until after the Court has ruled on spoliation.

And, Shree, we'll need to pull this one back up and make certain I rule on it after that point in time.

THE CLERK: Okay.

THE COURT: And if I forget, Mr. Pennock, remind me, because it's your motion.

MR. PENNOCK: Yes, Your Honor.

THE COURT: Okay. All right. That's that one. Cathleen, you need a break?

THE REPORTER: Yes, ma'am.

THE COURT: We're going to take Cathleen's break, about five or ten minutes, and I'll let you know in a minute.

We still have several we have to go through. You can anticipate that at some time after 1:00, but before 2:00 o'clock, I will be taking my break, a quick break for lunch, and then we can come back and finish these if we have not already finished

them. I hope we will have finished them because -- but we'll see -- because I have to read to my granddaughter between 1:00 and 1:30. That's her bedtime. And depending upon when she gets her teeth brushed, it's between 1:00 and 1:30 our time, which is 8:00 and 8:30 her time. My granddaughter, you will hear about her, Mr. Parker and Ms. Pruitt, she lives in Bavaria. So you know, you can pick up something to eat, but we'll have a sense. We may just go read and come right back and finish it up if I'm almost done. All right. It is -- let's be back at 12:00.

(Recess taken.)

THE CSO: All rise.

THE COURT: Okay, you may be seated. All right, got another minute.

Carmen, there are six. There was one that was stuck together.

Okay. Is that everybody, because technically you have another minute, so --

MR. PENNOCK: We're good to go, I think.

THE COURT: Okay, cool. All right. I understand there's some travel complications. Ms. Pruitt, you have to try to get back at 2:00 something, or something?

MS. PRUITT: Yes, ma'am. If I could ask permission to leave when you take your break.

THE COURT: Well, if you do that, you may be here at 10:00. I'm not good at taking them normally at a normal time,

but you can leave in time to make your plane.

MS. PRUITT: Thank you, Your Honor.

THE COURT: You're welcome. But be sure you talk with Ms. Gourley and she'll get you up to speed, and Mr. Parker, because you see now the nuances that play out here, okay?

Okay, all right. The rest of you I think it's 3:00-ish or something?

MR. PENNOCK: Yes, whenever. At your pleasure, Your Honor. Although I will say that we spoke at the break, I spoke with Jack and Bruce and Sara, and on two of the three remaining motions, the parties agree that you might want to defer them, although we're fully prepared to argue them. And that's the vitamin C and the Lipitor motion.

THE COURT: Okay. Well, we'll come to that one.

MR. PENNOCK: Those are two motions.

THE COURT: Cathleen, we're not on the record.

(Off the record.)

THE COURT: Carmen? I'm sorry.

DEPUTY SPECIAL MASTER RODRIGUEZ: People who need to catch planes at 3:15, so they'll need to leave about 2:00 or so is what time we need to finish if we possibly can.

THE COURT: Okay, we will shoot for that. Now that having been said, then, what we'll probably do is work straight through except for the time I will have to stop and go read to the baby, because that's my lunch hour and I'm not giving that

up. Hopefully, I'll find my cell phone, and I can Viber the kids and ask them what time they think it's going to happen.

Cathleen, this isn't on the record.

(Off the record.)

THE COURT: All right. The next one that comes up -- and Shree, if the other two stick together, remind me -- Document 3371, Plaintiffs' Motion in Limine to Exclude Any Mention That Lipitor is Alleged to Cause Cancer.

Now, I think from what I heard from Mr. Pennock, both parties agree there's no need for an opposition at this time. Rather, what I had thought I would do would be defer until after the *Daubert* motions and hearings. Is that accurate?

MR. PENNOCK: Your Honor, yes. We were prepared to discuss, but we think that's probably the best course.

THE COURT: I agree. Now the only thing that I would ask there is that, when you're doing it, no one has told me in what I have read whether Mr. Allen took Lipitor. That seems to be a rather relevant piece of information, and no one has told me that, so I would like to know that. Did he take it?

MS. GOURLEY: He did, Your Honor.

THE COURT: Cool. How long did he take it? Did he quit taking it before, after? Do we know? Find out; let me know.

MR. PENNOCK: Yes, Your Honor. I think what will be the fundamental issue here on the Lipitor is that there is not a

defense expert ascribing any part of the causation of his bladder cancer to Lipitor.

THE COURT: And if that's the case, then we won't have an issue. Ms. Gourley looks like a goldfish wanting to get air, so I think she's going to disagree. So there you go. We'll just see how it comes up, and if there's an expert that does it --

MS. GOURLEY: I do disagree, Your Honor, both with the characterization and the statement made, but I will agree, obviously, to defer this until after, after the *Daubert*. We would -- if these kind -- if you would like us to file a response now, we can to address the claims Mr. Pennock just made.

THE COURT: No, no, no. What I put here is ask if need opposition. I will likely defer until after Daubert. Without an expert, it's probably too speculative. However, remember when you're arguing this, there are multiple issues at play here. There could be -- I can envision maybe, but I'm not sure, and I'm not going to flag it for you, so I want y'all to think about to any of the issues that might be coming before the Court and the jury, but I also think it's very interesting to know whether or not Mr. Allen took it, when he took it, for how long, et cetera, if I'm going to -- if she does, Mr. Pennock, have an expert that's going into this.

MR. PENNOCK: Yes, ma'am.

THE COURT: Y'all are going to argue that. We'll deal with it at *Daubert*. She does or she doesn't. Or she does and

it's outside the scope, you know, whatever. We'll deal with it at Daubert.

Shree, did we ever find the answer to the question about New York law, sole, significant cause or --

All right, guys and gals, I want you to get me one page, okay, each side. I want to know under New York law, under the applicable products liability law, I want to know whether or not the alleged offending product, and I'm using that as a generic, has to be the sole cause, has to be a significant cause, has to be contained within a differential diagnosis, et cetera. Two pages maximum, normal font, and give me your case law. All right? It's New York law. All right? So that is relevant, and I need to know, and I'd like to know that before I hit *Daubert*.

Mr. Pennock, you stood and then sat back down.

MR. PENNOCK: I was just saying very good, Your Honor, we'll take care of that right away.

THE COURT: Cool beans. All right. Get that for me.

MS. GOURLEY: Do you have a date by which you would like this, Your Honor?

THE COURT: You can negotiate that with Ms. Rodriguez. But I really would like to have that one; I'd like to know that. That bears on a lot. And Shree and I have been trying to get to it, but I keep pulling him off on doing other things. We're trying to get that Bowerman completely finalized. Every time I think I have it finalized, it slips sideways on me, so -- it's a

sideways kind of slippery thing.

All right. I wish the Arkansas Supreme Court had been a little more distinct, but that's not the point here.

So I want to know that. If you agree, it would just be, you know, hunky-dory, peachy-keen, marvelous if you would say we agree and this is what it is. And this is your primary case. You know, the New York Supreme Court lays it out in this case. That would be marvelous. If you disagree, then please set it up in your one page so that I understand where the tension is between the two arguments, all right?

Now the small bit of guidance that I will give you on this one is that this is not going to turn into a mini trial on whether Lipitor causes cancer or not. You know, the tail is not going to wag this dog. So don't expect the tail is going to wag the dog because, you know, it's not.

Oh, I said Arkansas Supreme Court. I meant New York Supreme Court. It's the Arkansas Supreme Court that has not been helpful on Bowerman, on exaction on Bowerman.

MS. PRUITT: Sometimes their opinions aren't helpful in certain other areas as well, Your Honor.

THE COURT: Well, they have not been helpful on that one. And every time I think I have it, it slides sideways on me. No, it's the New York Supreme Court -- thank you, Shree -- that I want to know under the applicable products liability law. And then I'm assuming -- and this is an assumption on my part -- that

if New York has a products liability statute, which I understand it does, I've actually kind of looked at it, that that -- there will not be other tort claims outside of the products liability statute. And if one is arguing that there are, then I need to know what you are arguing and on what basis.

For instance, in Louisiana, you want to bring a products liability claim, you bring it under the products liability statute. So if you're going to have a products liability claim plus some other tort that the New York Supreme Court has said you can have, then flag that for me so I know, all right? And then I want to know what the elements and the standard are under that one.

I think, as I understand it, again, failure to warn falls under the products liability statute as well. All right. So I would very much like to have that.

And again, whether Lipitor causes cancer, in my opinion, is irrelevant and it is misleading and it is beyond the ability to help the jury make any decision. Whether Lipitor might or might not cause bladder cancer is a different matter, perhaps, I don't know. So I'm not -- so don't frame this in terms of, well, it causes cancer. I don't care whether it causes cancer, and I don't think the jury cares whether it causes cancer. On an analysis that is overly prejudicial because it's perhaps not probative to the injury that this particular gentleman might or might not have suffered. So I don't care

whether it causes cancer, okay?

And when I was reading the information that was provided, I didn't find that that particular aspect had been painted with a sufficiently narrow -- either turn off your mic or don't tear your pages, Richard -- a particularly fine enough brush. All right?

Okay. Let me see. And there's one other thing I'm going to be interested to see if it gets brought up in your -- when we argue this. So when you think about whether this is relevant, I want you to think about as to -- thank you, Carol.

(Off the record.)

THE COURT: As to what issue. There are multiple issues here, and there could -- I'm not saying there's no way it may be relevant; I don't know. But I'm not going to flag it for you. All right. If you'll excuse me one moment.

(Off the record.)

THE COURT: All right. So on that one, Chris, did I give you the document number? I don't think I did. That was 3371, Plaintiffs' Motion in Limine to Exclude Any Mention That Lipitor is Alleged to Cause Cancer. That is deferred until after the Daubert hearings.

Shree, put it on our list.

Again, please deal with bladder cancer, per se. That's the alleged problem that this gentleman has. Additionally, be issue specific if you want to try to get it in, Mr. Parker. Be

issue specific.

And then, Mr. Pennock, if you want to keep it out, you know, probably so you don't have to play your hand, if they do their response, remind me I told you you'll have a brief reply. If this doesn't get done until after the Daubert hearing, you can anticipate it might well be done in this venue and forum of oral argument.

MR. PENNOCK: Very good.

THE COURT: All right. Okay. The next one, Document Number 3372: Plaintiffs' Motion in Limine To Exclude Any Reference To Any Mention That Vitamin C Has Been Alleged to Cause Cancer.

Now I see this as a little bit different than Lipitor, quite frankly, because Lipitor may or may not have a warning label. Lipitor may or may not have, you know, tests and studies that have been vetted. But again, we're not going to turn this into a mini trial on Lipitor.

Vitamin C is a little looser, from what I gather, here. However, it is likely that this Court would grant this motion unless there is an expert with testimony that would, in fact, convince this Court that this is sufficiently relevant. So I'm likely to defer until after the Daubert.

But again, Mr. Parker, I'm not interested in whether or not the internet says that vitamin C can cause "cancer." Nor am I interested in whether or not any given expert might say that

vitamin C causes cancer. I think that is overly broad, therefore misleading, and therefore on a 104-403 analysis, the probative value, if any, is outweighed by the prejudicial value, and it will not be allowed.

So if you're going to try to get this in, you're going to have to have expert testimony that's going to make it sufficiently relevant as to the malady that this gentleman actually is experiencing, i.e., bladder cancer. And it's going to have to be sufficiently hammered out, if you will, at the Daubert hearing that what he or she is relying on is not, metaphorically speaking, coming off the internet.

And again, I'm not going to let this become a trial on whether or not vitamin C causes cancer or does not cause "cancer." So I think you have the short end of the stick here, but I will defer until after the Daubert hearings.

And Shree we'll bring it back up on our list after Daubert.

Again, because Daubert will be so late in the game, you can likely anticipate that this will be a -- done in this venue of oral argument. So kind of keep this in the back of your mind.

I really think you have the short end of the stick on this, Mr. Parker. Are you planning on putting forth evidence that vitamin C causes bladder cancer?

MR. PARKER: No, Your Honor. And I explained to Mr. Pennock, we make no claim that Lipitor or vitamin C caused

bladder cancer in humans. The evidence on vitamin C in particular, Your Honor, goes to an entirely different issue in this case. Has nothing to do with case specific causality. The issue here, Your Honor, has to do with the front end of this case with respect to plaintiffs' experts in the cases that we've tried who have testified that the explanation and the analysis of the bladder cancer in the laboratory animals was faulty, i.e., the crystal theory, and part of the reasoning given by the experts at that time -- not today, but at that time in 1996 to 1999 was, in fact, that Pioglitazone, Actos, and many other chemicals and agents like folic acid, vitamin C, were shown to induce bladder cancer in laboratory animals through the same mechanism that was seen with Actos.

So it is an issue that goes to the reasonableness of the company's position in negotiating and discussing the animal data with the FDA from '96 to '99, which has been criticized by some plaintiffs' experts.

We have never argued and do not intend in this case to argue that Mr. Allen's use of Lipitor or vitamin C caused his bladder cancer, and we've told that to Mr. Pennock.

THE COURT: Well, that's helpful. That would have been helpful to have known.

MR. PARKER: I told him that.

MR. PENNOCK: Well, wait a second, Your Honor.

THE COURT: Whoa, whoa, whoa, don't start with "wait a

second." That's argumentative.

MR. PENNOCK: I'm sorry.

THE COURT: Just take a breath. We're going to come back to that. That would have been helpful to know. So let's get the record straight.

Mr. Parker, I'm putting you on the record.

MR. PARKER: Yes, Your Honor.

THE COURT: You and the defendants do not intend -- and, Ms. Pruitt, this is going to bind you in the second trial unless you bring to my attention why it should not prior to trial, that you do not intend with your experts or in argument, opening, closing, or by inference in questions asked intend to argue that Lipitor, and the fact that Mr. Allen took Lipitor or vitamin C, and the fact that Mr. Allen took vitamin C, contributed to or caused his bladder cancer; is that correct?

MR. PARKER: Absolutely.

THE COURT: Okay. So on that point, Chris, it's granted by way of stipulation of the parties.

Now, as to whether or not, Mr. Pennock, it can be -- "it" meaning the fact that, in certain studies in 1990-esque, it was shown that perhaps Actos had a certain consequence or response and that was handled in a certain way with the FDA, that they can come back on cross with one of your experts who might have testified that Actos did not handle that discussion or interplay with the FDA in a reasonable fashion, that in fact that

was that they had the same result, didn't they, with the same mechanism, as to vitamin C. That seems like a persuasive argument. At this time, Mr. Pennock, would you like to be heard?

MR. PENNOCK: If I may, Your Honor.

THE COURT: Certainly.

MR. PENNOCK: I want to make sure that the Court appreciates that my -- the first time I heard the basis for opposing our motion was from Mr. Parker at the break. So I think he said, I keep telling him that. I've only heard it once, and he wasn't nearly as articulate as he was here in court, nor would I have expected him to as we walked by each other in the hall and had this discussion.

THE COURT: Hold that thought. Okay. Everyone here is of a certain age, except probably Shreedhar and maybe Ms. Pruitt. Maybe not Mr. Lanier, I don't know. Do you remember Cool Hand Luke? All right. Do you remember what the bull would say to him every time he beat him violently about the head and shoulders?

MR. PARKER: Yes, Your Honor.

THE COURT: What was it, Mr. Parker?

MR. PARKER: We have a failure to communicate.

THE COURT: Thank you very much. Don't let this happen again, guys and gals. Sit down, make certain that we don't have a failure to communicate. Clearly he didn't understand it, and he's an honorable man. Clearly Ms. Gourley or somebody thought they'd told him. And she's an honorable woman. Guys and gals,

sit down and make certain you understand it. This is not -- because I'm working on this stuff. Sit down and talk.

That's from which the folklore of the fire breathing dragon comes. Okay. Sit down and talk about this. Don't let it come up here: Well, that's the first time I've heard it. No, I told you. I am not interested in that. I've already raised my children. They live in Bavaria, okay? So, come on; sit down and talk about it.

Now, Mr. Pennock.

MR. PENNOCK: Yes, ma'am.

THE COURT: As you were saying, let's assume that I have now pinned him to the wall like a butterfly, okay, on a specimen board, so he's not going to make that argument. All right. What he is going to make an argument on, he says, is if one of your experts, if I'm understanding him correctly, one of your experts wants to testify that Actos -- I mean, Takeda or whomever, the Takeda entities, their interaction with the FDA was less than stellar -- I'm using deliberately generic terms here -- because here we had all these tests way back then. Then I think he gets up and gets to be able to say: Well, wasn't three a test on vitamin C during the same time, using the same mechanism that had the same result? He gets to ask that question. Why wouldn't he? You want to think about it and do a brief?

MR. PENNOCK: I would like to think about that, Judge, because I think there's a lot of foundation that would be

lacking, number one.

THE COURT: Well, he's going to have to lay his foundation.

MR. PENNOCK: I also think that there then becomes -- you know, it could be very confusing if we start talking about things like vitamin C causing cancer in animals and what does that have to do --

THE COURT: No, I don't think that's where he's going.

MR. PENNOCK: I'm not saying that's where he's going, Your Honor. I'm saying I think there are potential confusion issues that might require an exclusion of that, but I would like to write on that if I may.

THE COURT: Think about it. Think about it. All right. I'm going to tell you what. Mr. Parker, you get him two to three pages about how you intend to use this evidence.

And then, Mr. Pennock, you get two to three pages response on why no. Okay?

MR. PENNOCK: Yes, Your Honor.

THE COURT: Don't get off on it causes cancer because he's not going there. You can get a copy of this record from Cathleen, and you can print that out and give it to Mr. Lanier, and he will wave it at the time of trial, all right.

So talk to Carmen about your deadlines on that, all right, and then I will still defer, but it might be there's not much to deal with here. With that stipulation, that takes care

of the causing cancer business, quote, unquote.

If he only puts it forth, if your guy wants to try to nail them, hey, I think that's fair game on cross. I really do. If they want to say -- your people want to say Actos knew back in 1996 because of this study, you know, and therefore they are bad people, I think he gets to stand up and say: In 1996, wasn't there also a study that said vitamin C causes cancer under the same mechanism, same conditions, et cetera, et cetera? Then you get to come back and say: Well, it really wasn't the same, was it?

Now there will come a point in time where we're spending more time on the tail than the dog, and I'm not going to let us go down that path entirely. That's why this motion in limine will help us, but, okay.

All righty. Now I'm going to ask that, Mr. Parker, you go first on that one because he's saying this is the first time he's heard that one.

And Mr. Pennock, you get to respond on the two to three pages.

Carmen, you wanted to --

DEPUTY SPECIAL MASTER RODRIGUEZ: Judge, am I right that you want this on both the Lipitor and vitamin C?

THE COURT: Please. Yes, both the Lipitor and the vitamin C, because he's saying that's the same thing as to Lipitor.

Am I not correct, Mr. Parker?

MR. PARKER: Yes, Your Honor, you are correct.

THE COURT: So the stipulation that I just pinned you down on ties to Lipitor and vitamin C, correct?

MR. PARKER: Absolutely.

THE COURT: All right. You can wave it, Mr. Lanier.

MR. LANIER: I will.

THE COURT: All righty. Okay. So as to Lipitor and vitamin C, Parker, you go first because he now knows -- he now understands what that was.

And Ms. Pruitt, whatever happens here is going to happen in your trial, unless you can give me a reason why it should be different.

MS. PRUITT: Yes, Your Honor.

THE COURT: All right, the next one. All right, so let's see. Chris, let me go back. 3372, the Court orders additional briefing. Deadline to be declared by the Special Master, Shree.

Carmen, get it, you know, folding it in with everything else we've got to do, let's go ahead and get this one as quickly as possible, but certainly so that I have time to look at it before I get into the expert reports for Daubert prep. Okay.

So as to 3372 and as to 3371, the Court has ordered additional briefing with the defendants to take the lead, two to three pages. Thereafter, the plaintiffs can reply, two to three

pages. Deadline to be set by the Special Masters.

And once I have that briefing, the Court will determine whether I will need to defer until after the Daubert hearings. So I'm waiting on briefing on those, Shree, Chris. So I didn't defer; I've ordered briefing.

Okay. All right. The next one, Document Number 3373, Plaintiffs' Motion in Limine to Exclude any Reference to Conditions in Plaintiffs' Medical Records That Were Never Diagnosed by a Physician.

Okay. Now, again, if there's some confusion as to why, who is doing what, Mr. Parker, y'all intend to bring this up?

Ms. Gourley, y'all intend to bring this up?

MS. GOURLEY: Your Honor, my only point on this one was the condition for which this motion was brought is a reference in the plaintiff's medical records to --

THE COURT: This the gastritis one?

MS. GOURLEY: Gastroparesis --

THE COURT: Yeah.

MS. GOURLEY: -- yes, which, Your Honor, diabetes is a risk factor for developing that disease and may have some bearing on -- and may have some bearing on the severity of Mr. Allen's diabetes, which is, I think, fair game in this trial. In fact, I think having put his medical condition at issue, I don't think the plaintiffs can pick and choose what conditions or diagnoses out of his medical records we are or are not allowed to discuss,

having to do with his diabetes and bladder cancer. This goes to that.

And obviously, if they think it is never diagnosed by a physician and completely irrelevant to the case, presumably they deal with that on cross-examination and make me look like a fool for having raised it. But I don't think, having put his medical condition at issue, having brought this suit because he alleges an injury from taking a medicine used to treat his diabetes, that conditions which are associated with diabetes or anything else in his medical record can be declared off limits by the plaintiffs.

THE COURT: Who wants to respond for the plaintiffs?

MR. PENNOCK: I will, Your Honor.

THE COURT: Okay, go ahead, Mr. Pennock.

MR. PENNOCK: You're probably tired of hearing from me.

This particular condition he was not diagnosed with. And the point of our motion is that they ought not be able to pick questions that doctors might have popped to their head as to a problem that Mr. Allen might have had and then they make a note, "question of gastroparesis," but he's never diagnosed with it, and there's no evidence that he had it at all. In fact, this was a fairly self-limiting problem that he had in terms of, I think it resolved in something like seven days.

So there simply is nothing in his medical record that he suffered from this condition which probably would not go away or suffers from it, and therefore they should not be able to

throw that one against the wall.

Now, with respect to -- I may note, as I mentioned to Sara, I think, yesterday in my E-mail, we are withdrawing -- these motions are not on for today, but we are -- they are not on. The two motions that are not on are the toe amputation.

THE COURT: I've already looked at that one. They're on today, aren't they? They're on.

MR. PENNOCK: Okay. They were filed --

THE COURT: They are up, they're on.

MR. PENNOCK: They were filed on October 7th.

THE COURT: Can't speak to that. They're up, they're on. I've got them.

MR. PENNOCK: Well, I'm sorry, Your Honor. We filed those on 10-7. I didn't understand --

THE COURT: Those were the two late filings.

MR. PENNOCK: Yes, Your Honor.

THE COURT: Late filings get thrown in, and if I get another late filing, I shall beat you all violently about the head and shoulders. They get thrown in with the regular group. So, yeah, those were the two that came in late. So, yep, they're up.

All right. And we're going to talk about that. But let's go back to this one. And if you're going to withdraw that one, I will talk about that in a minute when we get to it, but let's -- I'm very methodical, Mr. Pennock.

MR. PENNOCK: I understand. Thank you.

THE COURT: Let's go with this one. As to this one, now is the treating physician -- there are two, as I understand it, a male and a female. And the only reason that's relevant is because I can distinguish it. The male came first and the female came later, and I don't remember their names. So, am I not right? Didn't the male doctor treat him for a time and then the female doctor who starts with an "A," she came after him?

MR. PENNOCK: Yes, Your Honor.

THE COURT: All right. Are these two treating physicians going to be testifying at trial?

MR. PENNOCK: By video, trial video.

THE COURT: Have you already taken those trial videos?

MR. PENNOCK: No, Your Honor.

THE COURT: Okay. All right. If they are going to be testifying at trial, I think that the defendants can go into whatever is in the medical records. I think she gets to ask about what is this that, you know, it's not double hearsay. It's not like where you have an emergency doctor's records and the intake nurse rights down "he was stewed," you know. I mean, she doesn't know whether he was drunk or not. That's hearsay within hearsay.

Here's that he had some kind of an indigestion issue, to put it in the plaintiff's sense, and he had possible gastro-whatever, to put it in the defense. Ask the doctor, it

seems.

Now I don't think, Ms. Gourley, that that gives you the right to ask: Did he not have, you know, gastromelitis [sic], or whatever? I mean, I guess you can ask it. And the doctor will say, no, because based upon what I saw here, it resolved; it was never diagnosed; they didn't know whether that's what he had or not. And I think it's a double-edged sword if you try to start bringing up stuff that's really not relevant and you get shot down on cross.

But if it's in his medical records, I think they get to bring it up. Now what arguments they get to make off of that, that's a different matter. So let's see what the doctors are going to say, okay? And if the doctors say, no, it wasn't that; it resolved in seven days, et cetera, et cetera. If you shoot her down in that, she might well want to edit it out when you're doing your final editing and we won't have to waste the time in front of the jury. If you don't shoot her down with the doctor, then she was right, there is some potential relevance here. So let's see what the doctors do on that one.

But I -- my gut on that one, Ms. Gourley, just so you'll know, is that it was too speculative; it's entirely too speculative, and I didn't know why it was relevant, because what they have here, he was treated with -- I'm on page 2. He was treated with nausea medication, which later resolved the nausea and vomiting. The records go on to state, quote, there was

some ? -- and that's a question mark, Cathleen, not the word -- as to whether he [plaintiff] has gastroparesis, or whatever.

Now, if that's all that's in the records, even if you don't shoot her down in the video, make your objection at the time as being overly speculative. When you do your editing, one of the things that we'll do with the video is you're going to have to show me where there are -- in any deposition -- any objections you want the Court to rule on, edit out all other objections. I will rule on them. Whether I will rule on them ahead of time or contemporaneously in front of the jury so that they will have the benefit of the objection will depend upon the nature of the objection. And you might still get it out, because I'm not going to spend three hours arguing about something that was never diagnosed.

I really don't think this is your strongest argument, Ms. Gourley, and Mr. Parker. Quite frankly, I think this is not likely to make it out of the wash. But with the, you know, try if you want on cross with the doctor and let's see where it goes because there may be something underneath that of which I'm unaware. But do not expect, in your trial strategy, that I'm going to let you spend three hours trying to prove up whether gastroparesis actually means he has severe diabetes or not.

Now I'm going to take two steps back. Why is this potentially relevant at all was my original question. I went back to the New York products liability law, and on the design

defect, it's a risk benefit analysis as to the utility. And that might or might not be why it might or might not be relevant. I don't know, okay? But the tail will not wag the dog.

So on this one it is denied, okay, but with no prejudice to the plaintiff's right to reurge it after the video depositions of the treating physicians have been taken. And I strongly urge the two of you to come to agreement on this once you see what washes out with the treating physicians, because Mr. Parker, Ms. Gourley, I don't think you have a winner here. I think you're going to lose on this one, but we'll wait and see.

All right. So, Chris, denied with no prejudice to the rights of the plaintiffs to reurge their position after the video depositions of the treating physicians have been taken. That's 3373.

The next one is 3374. All right. On this one I think the Special Master should have talked with you about this one. I want a response on this one by the 22nd at 4:30. I ask that you don't paint with an overly broad brush.

Carmen, you're standing up. Am I misspeaking?

DEPUTY SPECIAL MASTER RODRIGUEZ: Judge, can we have the title of that motion?

THE COURT: Oh, I'm sorry. Plaintiffs' Motion in Limine to Preclude Testimony/Argument That Lack of Statements by the FDA and Other Entities such as the ADA, ACA, SUO, AUA, ASCO, CDC, NIH, and URH is Evidence Regarding General Causation With

Respect to Actos Causing Bladder Cancer.

I'm sorry. If you see me looking down, I'm not checking my stocks, I don't have any; I'm a government employee. I'm checking to see about the other matter I had mentioned to you.

First, in the response, please do not blend the factual distinctions, as well as the different aspects of the exhibits. All right. Now, first, I am -- I hope I am correct in assuming that the questions from different depositions that were included here are not being submitted, asking this Court to rule on the questions as being objectionable in and of themselves as to when you are dealing with the deposition excerpts. I'm assuming that will be dealt with later in that venue. So I am not looking to these in that light at this time, but rather merely as support for the plaintiff's argument here.

Now I see a distinction between the FDA and the NGOs. I'm just going to use the term NGOs. It's probably not accurate as to, for instance, the CDC, but just -- there's a distinction there. I also see some factual distinctions as to the different arguments and/or factual analyses alluded to by the different exhibits. I could go through them, but because of our time constraints, I won't.

Additionally, I am interested in -- well, no, let me go back. First, the plaintiff's motion as it exists now will likely be denied because it is overly broad, if you check your

conclusion. You basically ask me in the conclusion is don't let them talk about anything. I'm engaging in hyperbole here. So on that you are going to lose.

So after the defendants respond, I suggest you narrow your prayer, if you will, from the conclusion of your motion, because right now it is way overly broad. Check your conclusion. You will lose.

Number two, on both sides, all the way around here, just, you know, there are double-edged swords at play here, guys and gals. That's all I'm going to say about that. Forrest Gump allusion.

Three. All right, look at the exhibits that were done, because different ones raise different aspects of issues. Now, so, in the responses the defense will respond -- well, they will give their response, all right. And I'm going to have you go first because we already have their motion. Then the plaintiffs will get to reply. I'll let you know the page limitation in a minute. And then the timing, again, I'm going to let Special Master Rodriguez and Russo help you with that because I don't know what else you have on your plate at any given point in time.

Now this is my question, defendants. Mr. Parker, for what purpose do you feel this is relevant, if at all?

MR. PARKER: On the question of -- particularly, on the FDA, Your Honor, the FDA has, as Your Honor knows, looked at this for 17 years. It is relevant on --

THE COURT: Now I'm going to back and stop you. "This," that's an indefinite pronoun. They have not looked at everything for 17 years. And I'm not just being persnickety. There are different questions chronologically when you look at this. There's the time during the test. There's the time when the -- what is it called when they changed their position -- the warning was changed. There's a time after -- so it's not been the same for 17 years. So the use of the indefinite pronoun is going to cause you to lose. That's no genuine issue of material fact, period. Okay, start over.

MR. PARKER: Beginning in 1996 there was a dialogue that started between Takeda and the FDA on the issue of whether or not Actos could, in fact, induce bladder cancer in people based upon the animal data. For the next three years, the FDA looked at the clinical studies that were going on that were being taken to show the efficacy of the drug and were questioning Takeda on whether or not they were also finding any evidence that, in fact, Actos may have relevance vis-a-vis bladder cancer in humans.

THE COURT: Okay. Why is that relevant to the inquiry before this Court and this jury? To what issue is that relevant? Liability? Causation? Good faith? To what issue, if any, is what occurred in the administrative arena between Takeda and the FDA, when the FDA was making certain of its administrative determinations, why, if at all, is that relevant to the inquiry

before this jury?

MR. PARKER: On the period of time in which these discussions about Actos and bladder cancer have been occurring between Takeda and the FDA, it is relevant, Your Honor, on the question of the adequacy of the labeling because the discussions and the FDA's views on whether the available evidence demonstrated an increased risk for bladder cancer were central to the question of what information were to go into the label.

It is also relevant, Your Honor --

THE COURT: Well, let me ask you this, before we leave that one. Are you then arguing that the FDA's determination of what was on the label or was not on the label is determinative of whether or not Takeda violated the New York products liability law as to warning?

MR. PARKER: No, I don't believe that that follows, Your Honor, but it does go to the reasonableness of Takeda's conduct in the discussion --

THE COURT: Why do we care as to what Takeda's -- whether Takeda's conduct was reasonable with -- in the discussion with the FDA? And I'm going to pull it out of this and let's say Takeda went on -- who is that horrible man? Howard Stern. Let's say Takeda went on the Howard Stern Show.

MR. PARKER: Yes, Your Honor.

THE COURT: We don't care whether their response was reasonable or not to Howard Stern, you see? So I'm coming back

to the underlying legal issue here that you're asking this jury to decide, and that is, whether or not under the New York products liability law and the elements therein, and in particular, I'm assuming, the failure to warn, why what Takeda did or did not do with the FDA is any different than what they did or did not do when they went on the Howard Stern Show?

MR. PARKER: Well, it's hard for me to respond in the context of the Howard Stern, but the argument is this. Ultimately -- and you're right, Your Honor, it's not the reasonableness of the conduct. And I misspoke. It is ultimately whether or not the available -- and I'll slow down.

THE COURT: Thank you.

MR. PARKER: Whether the available evidence justified at that point, under all the legal standards, a modification of the label.

THE COURT: What does it matter whether the FDA felt they did or they didn't?

MR. PARKER: Because I do believe it is probative when an expert gets on the stand and says: In my opinion, they should have put A, B, and C at this point in time in the label because it happens to be my opinion as a high-priced litigation expert. I do believe it is probative for a jury to know that the agency responsible for making decisions on labeling as submitted by the company disagrees with that expert.

THE COURT: Why? Why is that probative?

MR. PARKER: Because I think it goes to the very --

THE COURT: Like Howard Stern. Howard Stern disagrees. Why is it probative? Why is the FDA -- and then we're going to get into the NGOs -- but why is the FDA's decision, if we accept the argument -- and you might not accept it -- that the FDA is an administrative agency; that as an administrative agency, there are a great many different factors that go into their decision-making process at any given point in time; that some of those factors might or might not be political in nature; that the studies that the FDA might or might not have had at any given point in time might have been provided by one side or another, or might have been biased or another, which means we end up with a mini trial on what the FDA might have had or not had, which I don't think is judicially efficient. Why is it -- additionally, the FDA has a different standard that they are looking to. Case law even talks about that. There's not a whole lot on this, but the case law talks about that the FDA has a different standard in the degree and level of risk, et cetera.

So if all of that is the case, why is it -- and I'm going to give the plaintiffs the opportunity to defend the arguments I'm making because I'm not suggesting they are necessarily correct. I'm playing devil's advocate here.

Why is it that it is judicially efficient, then, to get into what the FDA did or did not do unless what the FDA did or did not do has a legal impact or influence? Otherwise, it's

factual, and then we are forced, are we not, to go into an exploration of what the FDA relied upon, what they didn't rely upon, the efficacy of the studies they relied upon, the information they looked at, the information they didn't look at, and we, in effect, are doing a mini trial on what the FDA was looking at, at any given point in time.

MR. PARKER: It is legal, Your Honor, has legal implications.

THE COURT: Tell me what the legal implications are under New York law.

MR. PARKER: Under New York law.

THE COURT: Yes, sir. That's the law that's applicable to this case. Any law clerk that walks into my office, that's the first question I ask them, if they have a thing. What law applies? I'm a stickler that way.

MR. PARKER: My client is obligated to comply with those laws of New York which require that labels be amended, included -- excuse me -- updated, as evidence becomes available.

THE COURT: That's fine, but that's not the FDA.

MR. PARKER: At some point in time, Your Honor -- and I was getting to the second point. At some point in time, this jury is going to hear litigation experts squaring off, having different opinions as to what should have happened at different points in time under New York law. It is helpful to the jury to know that the group of scientists who have looked at this product

for 17 years --

THE COURT: You're assuming there was a group of scientists looking at it. And, see, that's my concern.

MR. PARKER: Well --

THE COURT: Listen to me so that you can run with me here, because I'm not wedded to this, but I have problems with this. My layman's gut says, yeah, what the FDA says is relevant. My legal mind says, no, it's not. So we come back to this. No, we don't know whether or not a group of scientists at the FDA were looking at this issue.

And let's assume we get past the fact that there were a group -- don't give it to him until I'm finished talking, Ms. Gourley -- that there were a group of scientists that looked at it. We don't know what they looked at. So we've got to go into that. Then we don't know if that was the full body of information out there at the time. So we've got to look into that. Then we don't know the efficacy of what they did look at. We've got to look into that. Then we've got to figure out whether or not Senator Joe Blow or Mary Blow, who has the largest pharmaceutical manufacturer in the country in their district, sent their staffer down the road to chat, if you will, with the FDA and say, you know, let's look at this and, you know, we want you to think about this, too. We got to look into that. I can see this being a really problematic factual inquiry. So I'm interested in what legal significance it has.

And, Shree, the case that -- was it U.S. Supreme Court, the one that they failed -- they refused to hear -- they refused to grant cert. -- they refused to grant cert., the U.S. Supreme Court recently refused to grant cert. to one of the pharmaceutical companies wherein -- as to punitives, wasn't it, as to punitive damages, the issue of the FDA?

THE CLERK: I can go get it.

THE COURT: Yes, run go get it. Because I was thinking in these terms, and then because I'm a nerd, I enjoy listening to what the Supreme Court's doing. That one caught my eye, because the question, I think, Mr. Parker, and you're not going to win or lose it today; I'm going to give you the chance to brief it. You don't have to freak out. You haven't been -- yeah, but your eyes are getting smaller and smaller. You started out with them, and I could see --

MR. PARKER: I should put my glasses on.

THE COURT: I can see your eyes, but as we've continued, they've gotten smaller and smaller. Now, see, Mr. Lanier turns red. Your's turn smaller and smaller. Mr. Arsenault's veins pop, and Ms. Gourley eyes get bigger. So, you know, and Mr. McElligott puts his hands on his hips. That's why I want you here. I learn your quirks, okay? Mr. Pennock does this. And then he gets anxious. Okay, now -- like wait a minute. Okay. Now let's go back.

I am interested in what the legal significance is

because I find it an interesting question. Now there is some argument to be made that, if we went through this entire trial without the FDA coming up, that's the first question we're going to get from the jury; what did the FDA say about this? So I think, you know, it's going to play in --

All right, I'm going to step aside. The United States Supreme Court has declined to hear an appeal from Novartis Pharmaceuticals Corporation challenging the authority of courts to impose punitive damages under state law for wrongful conduct related to marketing of federally approved drugs.

And it goes on and it talks about, and my memory is they talk about the FDA and the FDA's goals. I'm reading from a Reuters Legal. But here's the case that talks about it; Lexus and Nexus, okay. So you might want to look at it. I don't know if it's on point. I haven't sat down and read it in its entirety, but you might want to look at it.

But in the little blurb that I got, it's out of the Fourth Circuit, and they were talking about the FDA and the FDA power. And of course, it was the difference between punitives and -- which might be how this might come up. That's what Sara is pointing and saying, see, I was trying to get that to him. See, it might come up as to punitives. It might be relevant as to punitives. That's why I said, there are double-edged swords here, guys.

So if this becomes, you know, if you get into

punitives, and I don't know whether you will or you won't, but if you get into punitives and the plaintiffs start arguing that Actos is, you know, a bad actor that should be punished, then we may have a pinhole that Hannibal gets to come running through with all of his elephants.

And I digress for a moment, but talk to the Special Masters. I think I have mentioned this to them. I think they have mentioned it to you how we want to bifurcate the punitive damage aspect. So be thinking about that.

So it might be relative as to punitives. Okay, that -- I'm going to give you the answer to the question I've been pinning. There might be legal significance if the question is whether or not Actos -- huh-uh -- Takeda was a bad actor, using generic terms, in the manner in which they dealt with Actos in the manner in which they dealt with the FDA.

See, look, they hid it, they had all this, et cetera. In that instance, you might well be able to come in and say, hey, look, none of these NGOs said it was bad. The FDA didn't say it was bad. Granted it didn't control; but, you know, we thought we were okay, yadda, yadda, yadda.

But as to liability and causation as to general liability and damages, I am not certain of the legal significance. I certainly understand the seductive nature of the argument. Hey, you know, the FDA didn't say we were bad. But the FDA's got other stuff going on.

Now hold that thought. You're like a dog with a bone. Hold that thought.

If there's a certain seductiveness to the argument that, if we get all the way through this trial and the FDA has not been brought up at all, that the jury is going to send out a question. However, hence, justification for why I'm asking you to identify these people. If I'm not mistaken, one of the plaintiffs' experts was a -- is a former person at the FDA or a head of the FDA during a certain relevant time frame. I cannot imagine he's going to get on and off the stand without the FDA coming up. If the FDA comes up, you might have created a pinhole and here come Hannibal and here come all his elephants and here come Mr. Parker waving his banner.

Now, as having independent relevance as to a legal issue, under New York law as to the Products Liability Act -- when I'm finished talking to him, Ms. Pruitt, you can bring it up; you can give it to Ms. Gourley now if you wish -- then I'm interested in what it is. I haven't figured it out, but that doesn't mean it's not there. So when you brief it, brief it with that mind-set.

I think the seductive argument that the FDA should get to come up will come up if they put that person on. Now Richard has now crossed his arms, so they may not pull that person -- I don't know -- he's thinking. But, you know, if that person comes on, the FDA will be the elephant in the room and he'll be

squatting out here. There's no way.

So as to the legal significance as to causation on general damages, please begin your brief in the first paragraph, telling me what, if any, legal significance it has under New York law as to what the FDA thought or did not think or did or did not do. I am not convinced there is any because of the different standards, if you look at some of the case law argued and if you understand what their goal is as an administrative agency.

Now, however, it might well have relevance as to punitive damages, and if it has relevance as to punitive damages, he's going to get to bring it up. Excuse me.

Off the record, Cathleen.

(Off the record.)

THE COURT: Okay. So, all right, on this one, now there is a distinction in my mind between the FDA and all these NGOs. And that's an incorrect term, but it is a term we'll use. I am not at all certain why that is relevant, if at all, except perhaps to punitive damages, okay?

So, again, if you open that door or you stick a pin there, you know, in going after punitives, and it's assuming, of course, you can get over the threshold that's needed under New York law to get it to the jury, which is why I'm likely to let the evidence in but not the argument, and certainly not evidence of damages and the value of Takeda, et cetera, before the jury until after we've determined if they think it should go there.

But as to punitive damages, double-edged sword. But if we have liability done ahead of time, which is what I'm thinking to do, then I don't see it coming in unless you can give me a legal significance, okay?

And sauce for the goose is sauce for the gander. I am terribly sorry, plaintiffs, but I do not see a distinction between the stated goal of one of the NGOs that you want to cite and the ones they want to cite. Good try, no turkey.

Off the record, Cathleen.

(Off the record.)

THE COURT: So, all right, now I don't see a distinction between that, so -- and I read it and I looked at it. I don't see a distinction between the stated goals. So as to 3374, again, I want a response from the defendants by the 22nd at 4:30. Please bear in mind the distinctions I made.

Mr. Parker, I'm interested in legal significance, not the seductivity of the argument, all right? And I think your stronger argument is as to punitives. I really don't see the basis under general liability, but I could be wrong.

And then secondarily, I think your argument -- it is of interest. I think the jury needs to know what FDA did in some fashion, I think, maybe; I don't know. But I can't imagine that guy is going to get on and off the stand without it coming up, so, all right.

Now the plaintiffs can have a reply. Carmen, I don't

see we set up a reply. Are they going to do them at the same time on the 22nd at 4:30?

DEPUTY SPECIAL MASTER RODRIGUEZ: No, Your Honor. I was going to set the 29th for the reply.

THE COURT: Okay. So the reply will be the 29th. No more than three to five pages. I don't think you need more than that on this, I don't think. If you do, talk to Carmen. Sara looks perplexed. Carmen, if they have to have more than that, let me know.

MS. GOURLEY: Well, Your Honor, the plaintiffs' motion was 15 pages, and so for our response, I understand a shorter reply, but for our response we would like more pages.

THE COURT: Oh, all right.

MS. GOURLEY: I'm happy to --

THE COURT: 13. It was 13 pages, their conclusion is on page 13. So your response is 13. Reply, three to five, somewhere in that neighborhood because you've already done it. All right. Okay, now.

So, Chris, on that one I'm deferring until I get the briefing. Shree, we'll pull this one up -- hopefully we'll be able to -- no, we won't, we won't be able to do it the next time.

Carmen, if we don't get these replies, we won't be able to do it the next time. So we'll have to do it -- we'll have to set up one more. Do we have one more hearing on limines beyond the one on the 28th or whenever that is?

DEPUTY SPECIAL MASTER RODRIGUEZ: No, Judge, that's the last one that was scheduled. We never scheduled one to deal with this last round that got filed yesterday and to deal with deferred motions.

THE COURT: So we'll set that up. Okay. So we will set up another one to deal with this last round that just got filed and the last of the deferreds. And when it will be, Carmen will let you know.

All right. So, Chris, on 3374, that is that one.

3377 which is Plaintiffs' Motion in Limine to Exclude any Evidence or Discussion of Plaintiff Terrence Allen's Diabetic Foot Ulcerations, Toe Amputation, Toe Joints, et cetera.

(Off the record.)

THE COURT: All right. Now I'm going to wait and do that one when I come back from reading to the baby because I'm interested in this one. I know you say you can defer it.

MS. GOURLEY: No. They withdrew it, Your Honor.

THE COURT: Oh, you withdrew it? Entirely?

MR. PENNOCK: Your Honor, as to that motion, yes. And as to the next one as well, yes.

THE COURT: You withdrew them completely?

MR. PENNOCK: Yes, because with consultation with the defendants, it's apparent to me that they need to be withdrawn. New York law under the learned intermediary, there are two ways you can defeat a learned intermediary, and one of them is that

the doctor says, I would have still prescribed it, but I would have passed the warning on to the patient. And the patient says, well, I wouldn't have taken it in the face of that bladder cancer risk. In that context, of course, what he was suffering from potentially from the diabetes is relevant, so --

THE COURT: Yeah, I think it also perhaps is relevant as to damages. I don't know. You know, maybe, maybe not, from your side. I mean, if you're talking about loss of enjoyment of life, which is a part of pain and suffering. And he already had lost a lot of his enjoyment of life because he had these other problems, so I think -- all right, so they're both withdrawn.

Again, it would be very beneficial to the Court, if you're going to withdraw motions, that you let me know before you are standing in court arguing the motion and I've been through them three and four times, particularly, ones that were filed late. Please, guys and gals, when you get it to me, that doesn't mean the game is over. On my side of the net, the game is just beginning.

All right. Is that all of them?

MR. PENNOCK: Yes, Your Honor.

THE COURT: Okay. All right. Carmen, anything else we need to bring up at this time?

DEPUTY SPECIAL MASTER RODRIGUEZ: I want to clarify the docket number of the last -- document number of the last one?

THE COURT: Okay. The last one is 3378, and then the

other one was 3377. Chris and Shree, they were withdrawn by the plaintiffs.

All right. Are there any other matters that need come before the Court at this time?

MR. ARSENAULT: No, Your Honor.

MS. GOURLEY: No, Your Honor.

THE COURT: All right. Mr. Parker, it was nice to have met you.

MR. PARKER: Wonderful to be here, Your Honor.

THE COURT: All right. And Ms. Gourley, please ask Ms. Pruitt to attend as many of these as possible --

MS. GOURLEY: Yes, she will, Your Honor.

THE COURT: -- because what's going to happen here will govern what'll happen in the second case unless there's reason not to be.

MS. GOURLEY: I understand.

THE COURT: And Mr. Parker, I expect and intend that you will continue to participate fully unless you are excused by the Court.

MR. PARKER: Yes, Your Honor.

THE COURT: All right. Mr. Russo?

SPECIAL MASTER RUSSO: Nothing, Your Honor.

THE COURT: Mr. DeJean?

DEPUTY SPECIAL MASTER DEJEAN: Nothing, Your Honor.

THE COURT: All right. Ms. Rodriguez, nothing else?

DEPUTY SPECIAL MASTER RODRIGUEZ: No, Your Honor.

THE COURT: So if no other matters need come before the Court, this court is adjourned.

(Hearing concluded.)

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C E R T I F I C A T E

I, Cathleen E. Marquardt, RMR, CRR, Federal Official Court Reporter, do hereby certify this 21st day of October, 2013,that the foregoing pages 1-104 constitute a true transcript of proceedings had in the above-entitled matter.

/s/ Cathleen E. Marquardt
Federal Official Court Reporter